NO. 82-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,
Petitioners

versus

GEORGE WILLIAMS, et al.,
Respondents

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS
STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

February 14, 1979

HEEBE, Chief Judge:

Plaintiffs, George James Williams, Duralph S. Hayes and Ernest W. Turner, Jr., individually and on behalf of all others similarly situated, filed this suit against the New Orleans Steamship Association (NOSA) and twenty-nine of its member corporations, shipping, stevedoring and freight-handling companies operating in the Port of New Orleans, along with the International Longshorement Association, Locals 1418 and 1419 General Longshore Workers, I.L.A., and Locals 1802 and 1683, Sacksewers, Sweepers, Waterboys and Coopers, I.L.A. Subsequently, Matthew D. Richard and John T. Aaron were permitted to intervene as plaintiffs, and three additional defendants, Louisiana Stevedores, Inc., Mid-Gulf Stevedores, Inc., and J. Young & Company, were joined. Plaintiffs alleged that the member companies of NOSA discriminated against them and members of the class they represent on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2(a). The allegations against the defendant Locals 1418 and 1419 of the General Longshore Workers, I.L.A., is that they are segregated by race, Local 1418 being virtually all white and Local 1419 all black. The same is allegedly true with respect to locals 1802 and 1683, the former being all white and the latter all black. It was specifically alleged that plaintiffs are affected by this segregation of the local unions because it provides one method by which preference in job assignment is given to white employees. The plaintiffs further alleged that the segregated locals had negotiated with NOSA for labor contract provisions which were inherently racially discriminatory. Plaintiffs seek a permanent injunction prohibiting NOSA and its member companies from violating 42 U.S.C. § 2000e—2. They also seek the issuance of a permanent injunction requiring defendant International Longshoremen Association and defendant locals to merge Locals 1683 and 1802 into one local and, also, Locals 1418 and 1419

into one local, with no further classification and segregation of membership on the basis of race.

An investigation, which resulted in a Report and Findings of the Department of Labor, dated July 1964, was conducted by the U.S. Department of Labor into the areas of manpower utilization and job security in the longshore industry in the Port of New Orleans. This study did not focus on the question of race. The study did reveal that historically employment in the longshore industry was on a casual and irregular basis. This was produced by a large surplus of labor in the longshore industry in New Orleans which, in turn, resulted in a total lack of job security in the Port. The figures which the study arrived at indicated that general cargo tonnage in the port of New Orleans, during the preceding seven-year period, ranged from a high of approximately 5.3 million tons in 1957 to a low of approximately 3.9 million tons in 1959. However, it was determined that the total number of hours worked annually by longshore employees during that seven-year period declined steadily. In the year 1962-63, total hours of employment had decreased by 27% below the 1956-57 work year. During that period, between 11,500 and 15,500 men were employed annually as longshore workers. However, the number of men hired on a weekly basis most frequently ranged between 6,000 and 6,200 employees, with a rare week providing work for 7,000 men. The obvious conclusion was that the total number of men in the workforce was almost double the number of jobs available in a normal workweek in the Port. There was no doubt that there existed an urgent need for the parties in New Orleans to develop a more stabilized workforce. The Report also noted that there was no seniority system in the Port of New Orleans and no formal attachment of men to companies that employed them. The only attachment was of men to the foreman who hired them into a gang and, therefore, they worked for their foreman and not for the company. (NOSA Exhibit # 13, "Report and Findings of the Department of Labor, dated July 1964.") Due in

large part to this Department of Labor study, a registration system was instituted which progressively stabilized employment in the Port.

The present nature and description of the resulting employment situation in the Port, which encompasses decasualization and institution of an employee registration system, is one agreed upon by all the parties, as evidenced by their Pre-trial Order. (Record, Document # 171.) Waterfront workers now employed in the Port of New Orleans are separated into various crafts and work under the jurisdiction of separate I.L.A. local unions. As stated above, this suit involves two of these crafts which are worked by waterfront workers: general longshoremen, working under the jurisdiction of Locals 1418 and 1419; sacksewers, sweepers, waterboys and coopers, working under the jurisdiction of Locals 1802 and 1683. At present, both of the above workforces are divided into categories consisting of: *"eligible employees,"* those who are eligible to participate in a "Guaranteed Annual Income" Plan (set out in Article XXVIII of NOSA's contract with the Locals) and who have first priority for employment as Category 1 employees and are issued cards known as "G Cards"; next, "G—O" men, Category 2, who are not covered by the "Guaranteed Annual Income" Plan but who have the same priority for employment as Category 1 men and are issued "G—O Cards"; third, "SG" men, who have a secondary priority for employment below the first two, are issued "SG Cards" and constitute Category 3; finally, casuals, made up of a constantly changing group of individuals, the great majority of whom apply for longshore work sporadically and who have no longshore identification cards. The first three categories described make up the "registered workforce," casuals not being among those registered. The foregoing is the classification system for longshoremen. The sacksewers, sweepers, waterboys and coopers are similarly classified in their workforce, the difference in terminology being of no importance as there exists the same types of categories with

the same types of priority.

Locals 1418 and 1419, together, and Locals 1683 and 1802, together, each enter into a single collective bargaining contract with NOSA, which represents most of the employers of waterfront labor in the Port of New Orleans. Local 1418 has an active membership of approximately 750, 744 of whom are white. Local 1419 has an active membership of approximately 3,608, of whom all are black. Local 1802 has an active membership of approximately 117, all of whom are white, and Local 1683 has an active membership of approximately 91, all of whom are black.

General longshore workers load and unload ships, among other duties. Hiring of all longshoremen by the various stevedores takes place now, and did in the past, in one central hall, the Waterfront Employment Center owned by NOSA. Longshoremen are organized into "gangs" for ship loading and unloading work, each gang being supervised by a foreman. The size of a gang depends on the type of cargo to be worked, with the minimum gang size being specified in NOSA's Agreement with Locals 1418 and 1419. Under the current Agreement, general cargo gangs must be at least 16 men; grain gangs which work bulk grain need a minimum of 8 men; other specialized gangs range in size from 6—with bulk ore—to 18—on LASH ship work; carpentry gangs are of no specified size. All pay rates for longshoremen are set out in the Deep Sea Agreement between NOSA and Locals 1418 and 1419 and vary under certain contractually designated circumstances. Longshore work is performed on a day-by-day basis, 7 days a week, with hiring done by the stevedoring companies at "shape ups" conducted twice a day at the Center, once in the morning and once in the afternoon. Some stevedoring companies use "regular" gangs to which they give preference on available work over non-regular gangs that may work for them from time to time. The company supervisor picks the foremen he wants to work for him, and the foremen hire their gangs. In a regular gang, the foreman is obliged

to hire available regular members of his gang for required available work before anyone else. If a company has more work than can be done on a particular day by its regular gangs, it may then hire non-regular gangs, which may be a gang that is regular with another company which has no work for it at that time. It may also be a gang which is assembled by a longshoreman who also works as a foremen when such work is available. The foremen and longshore gangs are assigned to ships by a company supervisor and then to individual hatches on the ship by a ship superintendent, also an employee of the company who is in overall charge of the work being done on the vessel for the company. With respect to the other unions, the waterboys are those workers who provide drinking water for a gang, some waterboys being regular with a company and attached to its regular gangs and others non-regular, the latter being generally hired in the same manner as non-regular longshoremen. Not every gang carries a single waterboy, as frequently two waterboys will service three gangs working a single ship. The hiring supervisor normally designates which foreman will be allowed to hire a waterboy.

In addition to the individual claims made by plaintiffs and plaintiffs-intervenors, the following are the "class claims," many of which purportedly encompass claims made by the individuals: (1) racial discrimination in employment of foremen in that various companies discriminate against black longshoremen in hiring regular foremen, in the hiring of non-regular foremen and in allotting less work to regular and/or non-regular black foremen than to white foremen; (2) racial discrimination against black longshoremen in the Waterboy-Sacksewer craft in the hiring of regular waterboys by major company-defendants and in allotting less work to them than to white waterboys; (3) racial discrimination in job assignment with general cargo gangs in that major company-defendants discriminate against black longshoremen by assigning a disproportionate number of them to hold work, while a disproportionate number of white longshoremen are

assigned to non-hold work; (4) racial discrimination in that various companies employ a disproportionately small number of black longshoremen for grain gangs; (5) racial discrimination against black longshoremen by employing a disproportionately small number of them in carpentry gangs; (6) racial discrimination in that various companies assigned a disproportionate amount of the most arduous and unpleasant work to all-black general cargo gangs; (7) racial discrimination in overall allotment of work to black longshoremen in that various companies assign a disproportionately small amount of their work to black longshoremen; (8) racial discrimination in that various companies exclude black longshoremen from employment as superintendents; (9) racial discrimination in employment on LASH gangs against black longshoremen by assigning to them a disproportionately small amount of such work. Of course, the final allegation of discrimination is against the I.L.A. and the defendant Locals as to black longshoremen, as a class, by maintaining dual, segregated locals.

The question first posed to this Court has been defined by plaintiffs as being not whether improvements have occurred in the Port of New Orleans for black longshoremen or whether some blacks have advanced, but whether vestiges and traditions of racial discrimination, which existed in years past, continue to taint waterfront employment practices. Plaintiffs no longer assert all of the separate claims of racial discrimination which they asserted in their Pre-trial Order and at trial. This is most true with respect to discrimination by defendant companies against blacks in longshore and craft 2 work. We think they could hardly assert that such discrimination was proved at trial. The racial composition of the "G" workforce as of June 10, 1974, was 2,078 black and 682 white, i.e., 75.3% black and 24.7% white. All parties agree that there has been a long-standing three-fourths majority of blacks among longshoremen. In the contract year 1969/70, there were more workers and blacks consti-

tuted slightly less than three fourths of the workforce—2,854 black longshoremen were registered under the NOSA/ILA Deep Sea Agreement and 994 white, for a percentage of 74.16 black and 25.83 white. In addition to the increase in the percentage of black longshoremen between 1969/70 and 1974, the distribution of longshore hours worked by black "G" longshoremen in the contract year of 1972/73 was 76.1% for blacks and 23.9% for whites. This translates into average annual income as follows:

COMPARISON OF HIGHEST EARNING
"G" LONGSHOREMEN BY RACE
Contract Year 1972/73
(from NOSA Exs. # 46-50)

	Race/	Average/ Hours	Average/ Earnings	Average/ Rate
100 Highest	Black	2,474.46	$19,369.48	$7.50
	White	2,318.03	17,140.10	$7.51
200 Highest	Black	2,298.46	17,117.55	7.28
	White	2,097.41	15,051.64	7.24
300 Highest	Black	2,193.71	15,935.24	7.15
	White	1,939.58	13,687.52	7.11
400 Highest	Black	2,123.70	15,154.17	7.05
	White	1,815.90	12,654.09	7.01
500 Highest	Black	2,062.98	14,561.67	6.99
	White	1,700.76	11,722.21	6.90
600 Highest	Black	1,968.67	13,672.46	6.90
	White	1,357.10	9,299.09	6.48

In considering the above chart, it should be kept in mind that there is a direct correlation between earnings and absenteeism, some individuals with a greater percentage of availability for work have earned slightly less than some employees with somewhat less hours worked, apparently due to the hourly rate for the type of work performed. The plaintiffs have now narrowed

their allegations of racial discrimination by the defendant-companies to the following: (1) racial discrimination in preferred work assignments, i.e., longshoremen assigned to grain cargo, waterboys for grain cargo crews, carpentry work and assignments to LASH vessels and deck jobs in "integrated" general cargo crews; (2) racial discrimination in the selection and assignment of supervisors, i.e., superintendents and foremen (regular, extra, and grain). Plaintiffs attribute virtually all of the overall wage, hour and rate differences which they allege is suffered by blacks in the workforce to discrimination in the allocation of grain cargo work. These are, of course, in addition to the charges of illegal maintenance of racial segregation of local unions and discrimination against individual plaintiffs and plaintiff-intervenors.

In addition to the described narrowing of the area of alleged discrimination to class discrimination in grain and other premium work, plaintiffs have reduced the original twenty-seven defendant-stevedoring companies on the New Orleans waterfront to the following fifteen, which allegedly discriminate against blacks in the defined manner: (1) Atlantic and Gulf Stevedores, Inc.; (2) Cooper Stevedoring of Louisiana, Inc.; (3) Dixie Stevedores, Inc.; (4) J.P. Florio & Company, Inc.; (5) Gulf Stevedore Corporation; (6) Louisiana Stevedores, Inc.; (7) Lykes Bros. Steamship Co., Inc.; (8) Mid-Gulf Stevedores, Inc.; (9) New Orleans Stevedoring Company; (10) Rogers Terminal and Shipping Corporation; (11) Ryan Stevedoring Company, Inc.; (12) T. Smith & Son, Inc.; (13) Strachan Shipping Company; (14) J. Young & Company, Inc.; (15) Southern Stevedoring Company. In order to prove their case, plaintiffs have undertaken the task of showing that each of these defendants discriminate in some particular though not necessarily identical way and that this individual discrimination then relates back to overall discrimination in the industry. This is somewhat of a departure from the position which plaintiffs took much earlier in the development of this

suit when this Court was persuaded by them that all of the companies that were members of NOSA should be treated as "integral parts of a conglomerate employer." Twelve of the named defendants filed a motion to dismiss for lack of jurisdiction on the basis that Title VII of the Civil Rights Act, 42 U.S.C. § 2000e—2(a), was inapplicable to them as § 2000e defined *employer* as one with 25 or more employees for each working day. (Record, Documents Nos. 17 and 26 [p.2].) They had filed affidavits to the effect that they employed less than that number. In defining NOSA as an integrated enterprise the plaintiffs pointed out that for employment purposes, the members of NOSA operated as one large employer which controlled employment on the waterfront and established uniform employment practices applicable to all member companies. They further made the observation that NOSA was the collective bargaining agent for all of these companies operating in the Port of New Orleans and, as such, *established uniform employment policies applicable to all member companies* which delegated this broad authority to it. In view of this position, the Court will consider whether its agreement with plaintiffs' earlier position on the issue of membership-employer identity should also apply to its determination of the issue of discrimination. The Court also points out, as did plaintiffs, that its findings and conclusions at this stage deal only with issues of liability and do not attempt to consider any possible remedies that may be necessitated by its decision herein.

Racial Discrimination as to Individual Plaintiffs

Plaintiff, George Williams, filed a charge of racial discrimination in employment against all defendants with the EEOC and, subsequently, received a notification of his right to institute suit in view of the inability of the EEOC to resolve the issue. This suit was filed on March 30, 1971. Williams filed a second charge with the EEOC against the defendants alleging retaliation

against him on account of the filing of suit. The Commission authorized him to sue on this charge on February 7, 1973. Williams is a black longshoreman who started work in the Port of New Orleans in 1956 as a longshoreman in general cargo gangs. He became a member of Local 1419 in that same year, *i.e.*, 1956. In June of 1965, Williams organized a general longshore gang and began attempting to get work as a foreman. He was never a regular foreman with any stevedoring company between the time he organized the gang in 1965 and the date he retired from the riverfront on November 30, 1971. In November of 1971, Williams developed an ulcer which rendered him physically unable to do longshore work and he retired on a pension. The Court does not feel that Williams carried his burden of proving that he did not become a regular foreman because of racial discrimination or that he received less work than whites as an "extra" foreman because of his race. There is no question in the Court's mind that Williams "hustled" as much as possible for foreman work, according to his own testimony and also by the fact that he did receive more than a modicum of such work. However, this Court concludes that the weight of the credible evidence indicates that Williams' failure to become a regular foreman was attributable to his poor or inadequate performance, based on a productivity and accident record which were consistently unacceptable to the defendant employers.

There is evidence in the record that quite a few of the defendant companies gave Williams a chance to work as a foreman. Strachan Shipping hired Williams approximately ten times as a foreman in 1969, and about four times in 1970. In 1969, he was warned of poor production on the job, and it was concluded that there was no improvement in 1970. At his request, he was given one other chance to work as a foreman in that year. This time he refused to follow advice given by the superintendent at Strachan, his work was found lacking and he ceased working for the company in 1970.

This problem of poor performance proved to be the same reason Williams did not receive more work from other defendant companies. He worked as a foreman off and on from 1969 to 1971 for Louisiana Stevedores, but the evidence indicates that he was inept and unconscientious about supervising his men. After one bad experience, Louisiana refused to hire him again. Williams also worked for United States Stevedores between 1965 and 1971 as a non-regular foreman. The criticism of him by this company was specific with respect to the fact that he was often not around and his gang often worked without adequate supervision because of his absence. In addition, he was not considered a good foreman there because of lack of control over his gang. Williams also worked sporadically for Lykes Brothers prior to February of 1970. At this time, Williams' gang experienced an accident while working one of Lykes' vessels. The accident was the result of improper rigging. There is much disputing evidence as to who was at fault for the dangerous manner of rigging. The daily work report for the day in question does indicate that Williams' gang rigged the hatch where the accident took place. Regardless of who was actually at fault, there is no question but that the company believed that a foreman of a gang was responsible for the rigging of a hatch and that Williams was responsible for the accident. As a result, instructions were given that he and his gang were not to be hired again *after* completion of work in that hatch, as contractually required. With respect to the six companies that Williams accused of not hiring him on racial grounds, the Court finds that all of them either by first-hand experience or by reputation were of the opinion that Williams' work showed poor performance.

We turn to plaintiff Duralph S. Hayes, a black waterfront worker and member of Local 1683, who filed a charge of racial discrimination against defendants T. Smith & Son, Inc., and Local 1802 on November 25, 1968, and received his "right to sue" letter from the EEOC on March 1, 1971. Hayes started work in the

Port as a waterboy in July 1960 and became a member of Local 1683 shortly thereafter. Hayes has alleged that from the early part of 1968, he was one of defendant T. Smith's four regular waterboys on the night shift. However, at the time of trial, Hayes was a cooper, one who repairs damaged cargo and does other work on the wharf, at United Brands. At the time in question, Hayes and three white waterboys were the regular night help. The three agreed among themselves to divide the work up so that all would get an equal amount of it as all four would not be sent out at the same time. There is some conflict, but the Court is of the opinion that this arrangement ended when one white waterboy refused to continue to participate in it. Hayes alleges that after this, The (sic) T. Smith superintendent showed preference for a white waterboy, one Hingle, and this constituted the racial discrimination. However, the evidence shows that for the second, third and fourth quarters of 1968, Hayes earned more or slightly less than Hingle in each period. Plaintiff Hayes has not carried his burden of proving discriminatory practices on the part of T. Smith. The Court can only conclude that he left T. Smith to begin working for United Brands as a cooper.

The third plaintiff, Ernest Turner, filed a charge of racial discrimination against defendant NOSA and all of its member companies on March 19, 1968, and received a "right to sue" letter from the EEOC on March 17, 1971. His chief reason for filing a charge against his "employer" was based on discrimination in hiring of black waterboys, most of whom were hired as extras. He correlates this discrimination to the method of hiring waterboys which denies him an equal amount of time, *i.e.*, the waterboys are hired by a foreman and black foremen are given less opportunity to hire their waterboys. The issue of discrimination appears to revolve around Turner's contenion that he was a regular waterboy. Turner filed his charge against New Orleans Stevedores with whom it is alleged by him, he started working regularly as a waterboy in June or

July of 1968. The evidence predominates that Turner, contrary to his belief, was not a regular waterboy for New Orleans Stevedores. At the time complained of, New Orleans had only four regular waterboys, two black and two white, and Turner was not one of them. One Charlie Roy, a black foreman with New Orleans did carry Turner as a waterboy but, as he testified, only as an *extra*. He further stated that most of the time when he needed Turner he could not find him. Turner subsequently told him that he was working as a regular waterboy for T. Smith. This appears to be the situation as it existed, and there are, therefore, no real grounds against New Orleans Stevedores which, at least, have been proven by Turner.

The plaintiff-intervenors are Matthew D. Richard and John T. Aaron, black longshoremen on the New Orleans waterfront who are members of Local 1419. On July 14, 1971, Richard filed a charge of racial discrimination against Gulf Stevedore corporation and later received a "right to sue" letter from the EEOC on April 27, 1973. From 1951 until 1970, Richard was a regular foreman of a regular general cargo gang at Gulf Stevedores. In 1951, Richard was in an all-black gang with a black foreman and at that time was asked to take over the foreman's job because the former foreman left. Richard alleged that initially he was treated well, but when the former vice president of the company left, the new vice president and hiring superintendent began to discriminate against him and his gang in work assignments as follows: (1) Richard and his gang got less work; (2) Richard and his gang got more than their share of work in the # 1 hold of ships, the hold where it is more difficult to move cargo, and in a similar but less difficult # 5 hold; (3) Richard and his gang were assigned to load and unload the most unpleasant hand-movable cargo. For reasons that are in dispute, Richard started losing gang members and his accident rate and lost man hours increased. Subsequently, in May 1971, he was discharged as a foreman by Gulf's vice president. Richard alleges that it was

racial discrimination against his gang in work assignments that led to his discharge. Defendants assert that Richard's termination was caused by his excessively high accident rate which was the highest of any of Gulf's foremen in terms of cost per man-hour work. This Court finds that it was, in fact, three times higher than the Gulf foreman with the next highest accident rate and was the result of thirteen accidents in his gang during the contract year 1969-70. There followed five more accidents between October 1970 and March 1971. It was the opinion of his superiors that this accident record was attributable to Richard's failure to personally hire his gang at the Center or to stay with them throughout the day. We are not convinced by plaintiff's theory that the type of cargo the gang worked was related to or the cause of the number of accidents. Neither do we agree with plaintiffs that one cannot correlate the amount of earnings of Richard as a foreman with the amount of work his men received because Richard was on a guarantee. Richard's earnings for 1969 and 1970 are higher than the average earnings of all regular foremen at Gulf Stevedores, and if all the other foremen were also on a guarantee, then Richard's gang would have received their fair share of Gulf work during these two years prior to his termination. We conclude that the reason for Richard's termination was his unacceptable safety record and that he has not carried his burden of proving otherwise, *i.e.*, that it was the result of racial descrimination.

John T. Aaron, the other plaintiff-intervenor, a black longshoreman who had worked as a regular on general cargo gangs, worked for Atlantic and Gulf in 1969 and 1970, and for Mid-Gulf Stevedores in 1970, 1971 and part of 1972. In November 1972, Aaron was discharged from the gang by its foreman. Regular gangs at Mid-Gulf were composed of a core of ten men who would always work if the gang was working, an additional three men who would work when a specific type of barge work was available and, lastly, five more men who were "regulars" on the gang only when the

gang was at its full complement of eighteen men. This occurred when the general cargo gangs worked LASH vessels (which refers to lighter aboard ship and means there is no heavy physical labor associated with LASH work), which Mid-Gulf serviced exclusively, in addition to other kinds of work that went along with it. Aaron was a regular on the eighteen-man gang only. Therfore, when Aaron was not working on a LASH ship, the only type which he was obligated to work, he would seek longshore work with another foreman. However, Aaron also worked for a construction company. After he was terminated, Aaron filed an EEOC charge in which he alleged that he "was fired from a regular grain crew in which [he] had been employed for over a year, because of [his] race." (Plaintiffs' Exhibit # 44.) Contrary to this allegation, this Court is convinced from the evidence that Aaron was discharged from the gang because of excessive absenteeism. In fact, the evidence indicates that Aaron's foreman complained to Mid-Gulf's general manager about the fact that he had not been available on a regular basis over a long period of time. On investigation, the general manager agreed with Aaron's foreman that Aaron should be dropped from the gang. On November 6, 1972, Aaron was replaced with a black longshoreman. On investigation of the matter by the vice president of Local 1419, it was determined that Aaron had been absent over 50% of the time he worked for Mid-Gulf. In fact, from April 1972 through October 1972 Aaron worked a total of 775 hours as an iron worker under the jurisdiction of the local Iron Workers Unions. The Court concludes that Aaron's termination was not motivated by racial discrimination and, further, that no other longshoreman in the same gang as Aaron had an absentee record as bad or worse than Aaron's during the critical seven-month period which was considered by those in authority in the decision to terminate Aaron. On the evidence, we are convinced that Aaron failed to prove that his discharge was the result of racial discrimination.

Class Action

This suit was filed by plaintiffs on behalf of themselves and "...all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure." Plaintiffs then set out, in Paragraph II of their Complaint, requirements of numerosity, the existence of issues of law and fact common to the class, fair and adequate representation by plaintiffs, claims and defenses of defendants typical of those of the class and a situation where defendants have refused to act on certain grounds applicable to plaintiffs and the class. By Minute Entry of January 18, 1972, this Court denied a motion to dismiss the class action filed by NOSA and the defendant employers. Subsequently, defendants filed a motion to dismiss the class action on certain issues, which the Court deferred ruling on until after the trial of the merits of the case, by Minute Entry dated July 18, 1974. Even if we had not done this, as stated in Wright & Miller, Federal Practice and Procedure: Civil § 1785, p. 137: "The court's initial decision under Rule 23(c)(1) that an action is maintainable on a class basis in fact may be the final resolution of the question, although it is not irreversible and may be altered or amended at a later date." Of course, the fact that we have held that the named plaintiffs have not proved their own Title VII claim does not mean that the class of employees they seek to represent are deprived of a remedy if it is appropriate. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Brown v. Gaston County Dyeing Machine Company*, 457 F.2d 1377, 1380 (4th Cir. 1972). However, we are convinced at this point that plaintiffs have not proved that they are entitled to maintain a class action under Rule 23(a) and (b)(2) in that the class lacks the requisite numerosity and, even if that were not the case, plaintiffs have not proved employment discrimination in the specific areas they have delineated which is applicable to a specific group of employees similarly situated and generally acted upon by the defendants

with respect to an applicable class.

Numerosity. In 1968, fifteen waterfront workers filed charges of racial discrimination with the EEOC against NOSA and some of its members, including fourteen of the remaining fifteen defendant stevedore companies in this suit. These charges attacked a broad range of employment practices alleged to be racially discriminatory. The EEOC consolidated the charges and undertook a year-and-a-half investigation which effectuated conciliation efforts that resulted in a formal Settlement Agreement (NOSA Exhibit # 7), on March 2, 1971. This Agreement obtained general as well as specific commitments from all defendant employers on the issues of nondiscriminatory practices and policies, covering many of the complaints involved in this case. Most differences involve the relief sought and not the substance of the charge. See, Minute Entry of January 18, 1972 (Record, Document # 39, p. 6). In addition, it established a reporting and monitoring procedure by the EEOC which would insure future compliance with the Agreement. The Settlement Agreement was ratified and signed by all of the riverfront companies charged with discrimination and by eleven of the charging parties, with the exception of the three plaintiffs in this suit, Williams, Turner and Hayes, and was also approved and executed by the EEOC. This Court is aware that in its Minute Entry of January 18, 1972, *supra*, it held that the Settlement Agreement could have no effect on the right of the individual plaintiffs to bring suit and also that the fact that the signatories to the Agreement constituted the majority of the charging parties did not mean that they were more representative of the class than the instant plaintiffs. However, having heard all of the evidence and having listened to plaintiffs' witnesses, the Court cannot now disregard the fact that eleven out of fourteen complainants were satisfied with their settlement with the defendant companies and plaintiffs have given no proof of any other group sufficiently large to warrant class action. Additionally, although we have

not been presented with an actual petition disclaiming class representation by the individual black members of Local 1419, we are aware that the majority of the members of Local 1419 do not wish to be represented as a class in the plaintiffs' efforts to integrate the dual unions. We conclude, as did the trial court in *Bailey v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551, 553 (W.D. La. 1976), which involved similar issues in the Port of Baton Rouge, that " '[t]he facts of this case clearly establish that the claims of [the plaintiffs] are individual in nature and the issues raised by them are not issues common to any definable class too numerous to sue individually ...' " under Rule 23, F.R.Civ.P. Therefore, since our decision does not have any class application, any other rulings in this decision will have *res judicata* effect only as to the individual plaintiffs. *Roman v. ESB, Inc.*, 550 F.2d 1343, 1355 (4th Cir. 1976).

Employment Discrimination—Segregated Locals

Plaintiffs assert now, and previously on their motion for separate judgment on the issue of the maintenance of segregated local unions, that the maintenance of a substantially all white union and an all black union has an adverse effect on the employment opportunities of black longshoremen based, of course, on the fact that they outnumber white longshoremen by three to one and are not so treated. Plaintiffs further assert that even if the Court does not find employment discrimination, that the maintenance of segregated locals is a *per se* violation of Title VII of the Civil Rights Act.

As stated earlier in the Opinion, the areas of racial discrimination have been broken down by plaintiffs into two categories, with subdivisions under each. The first is racial discrimination in preferred work assignments and includes: (1) grain cargo gangs; (2) carpentry work; (3) LASH vessels—Mid-Gulf; (4) assignment of preferred deck jobs. The second is in the selection

and assignment of supervisors: (1) general and ship superintendents; (2) foremen, regular and extra and grain foremen. Before discussing these specific areas, there are two assumptions plaintiffs have made with which this Court is not in agreement. The first has been touched upon, *i.e.*, that each defendant employer is responsible for its own employment practices. If this had always been the plaintiffs' position, the Court would never have considered the members of NOSA an integral unit. However, we did so on the basis that they all followed the same employment practices dictated by NOSA. It is not certain, but in view of our ultimate decision in this area it may not be necessary to resolve this matter. However, if we have to, we think that our view of the industry, as will be set forth, precludes now an attempted showing of employment discrimination by scrutinizing the disparities in black and white employment by fifteen separate employers who purportedly discriminate in a variety of individual ways. The second point is that, with respect to some of plaintiffs' statistics, the figures are based solely on integrated gangs, without regard to gangs which are all black. Since plaintiffs argue that, even when the focus is expanded to include *all* gangs, the results are not changed significantly, we see no reason not to operate on an analysis of *all* regular gangs.

I. Racial Discrimination in Preferred Work Assignments

(1) Grain Cargo Gangs—Longshoremen

Apparently work in grain cargo is easier and better paying than other general longshore work, there being a 20 cent per hour premium for such work. Up to and during some of the trial of this suit, the Deep Sea Agreement between NOSA and Unions provided that: "So far as is practical, work is to be divided between members of ILA Locals 1418 and 1419 in grain trimming machine gangs, and/or hand trimming gangs." In practice, this meant that grain crews were to be half

white and half black, assuming that sufficient longshoremen of both races were available, even though the active black local membership was more than three times greater than that of the white. Plaintiffs argue that the clause was originally agreed to by the black union because of its concern that its members would receive even less than half of the grain cargo work as a result of discrimination by white foremen. However, according to our reading of the testimony of the President of Local 1419 at that time, Wilfred Daliet, whose testimony plaintiffs rely on, it was his understanding that the foremen, the majority of whom were white, did hire as equal a number of black and white for grain gangs as they could. But it was the former president of 1419 who insisted that the clause be inserted in the Deep Sea Agreement to protect his men and to see to it that they would get a "fair shake." The clause was continued in one form or another down to the current contract year of 1971-1974. However, on the expiration of that contract on September 30, 1974, it was determined that it would not be necessary to continue the grain clause into the next contract because of the strides made by blacks with respect to grain cargo work, including the addition of three black foremen in the grain industry in 1974. (Transcript, pp. 1572-77, Wilfred Dailet.) This is not to say that we disagree with plaintiffs' position that the division of grain cargo work was discriminatory and that it was accomplished through a segregated union system. We also cannot disagree with plaintiffs, on the facts, that the removal of the contract language was a tactic of this litigation and in response to the dictates of Title VII. We are not prepared, at this point, to say that this suit was not the catalyst for the removal of the clause.

(2) Grain Cargo Crews—Waterboys

In narrowing its areas of discrimination, the plaintiffs next look at the allocation of grain waterboy work, as opposed to blacks employed as regular water-

boys. They first point out that there is nothing in the waterboy contract concerning the allocation of grain waterboy work between members of the white and black locals as existed in the Deep Sea Agreement as to grain cargo crews. In spite of this, it seems to the Court that there must have been some impact from the 50-50 grain work division since, as previously described, there is not one waterboy for each gang. In addition, we think that this subdivision is just too insignificant in terms of the entire waterfront workforce to give much weight to plaintiffs' case. We prefer to look at the overall picture of waterboys at defendant companies. The evidence indicates the following for individual company defendants, the basis on which plaintiffs want to operate: during 1973, Cooper Stevedoring had two regular waterboys, one black earning $17,517 and one white earning $8,997; for the same period, Strachan Shipping had four regular waterboys, two blacks, one earning $19,614 and one $11,870, and two whites, one earning $8,915 and one earning $8,654; for the same year, J. Young & Company employed three waterboys, one black and two white, the black man earning more than either of the two whites; for the year, J.P. Florio employed three waterboys, one black who earned $10,641, one white who earned $7,841 and one white who earned $4,794; finally, for that year, Gulf Stevedores, employed two regular waterboys, on white who earned $4,949 and one black who earned $5,897. In addition to what the foregoing could indicate, that less blacks are working more hours than whites as regular waterboys, NOSA Exhibit # 24 shows that the regular waterboys used by defendant companies has been declining over the past years. In 1972 there were 29 black and 48 white, and in 1973 there were 27 black and 38 white, which indicates a substantially greater decrease of whites over the small decrease of blacks. Moreover, on an average basis during 1972 and 1973, earnings of regular waterboys were approximately the same for blacks and whites.

(3) Carpentry Work

Plaintiffs next focus on what they allege to be a pattern or practice of racial discrimination in the hiring of longshoremen to work in carpentry gangs. Carpentry work is used in connection with loading and unloading older ships in which supporting walls are constructed to hold cargo and also in the securing and lashing of cargo aboard vessels. It is uncontested that the use of carpenters has diminished in recent years and that in the past, defendant companies had traditionally assigned most carpentry work to whites. As a corollary, men working as members of the few remaining carpentry gangs all have very long employment records, many of which predate the effective date of the Civil Rights Act of 1964. Furthermore, there have been few additional openings in regular gangs due to the foregoing. The combination of seniority of long standing coupled with a decrease in the type of work does not lend itself to a finding of discrimination in hiring of black carpenters.

(4) LASH Vessels

The nature of LASH vessel work has previously been described. Defendants have shown that 83.7% of all LASH/seabee and container gangs employed by defendant employers is black, hardly indicative of racial discrimination. Plaintiffs, however, have focused solely on defendant Mid-Gulf which, as earlier pointed out, exclusively services LASH vessels. Plaintiffs assert that there was an agreement between the two locals and Mid-Gulf as to the division of LASH work between the two locals. However, as the court appreciates the evidence, Mid-Gulf was instructed by Local 1418 and Local 1419 to divide the work up on a 40-60 basis, respectively, between the two and Mid-Gulf complied with these instructions for about a year and a half, starting in 1968. The underlying reason for this was that both unions went on strike over the number of whites and blacks who would work LASH gangs, as it was obvious that LASH vessels would not require as

many longshoremen as the previous types of vessels. In 1971, Mid-Gulf advised the two unions that it would no longer apply this requested ratio and, at the time of trial, according to the testimony of the general manager of Mid-Gulf, the ratio of their gangs was about 72-28 or 75-25. The evidence further indicates that among five of the major defendant companies, Lykes Brothers, Mid-Gulf, J. Young, Atlantic & Gulf, T. Smith & Son, in the year 1972, the racial composition of LASH, seabee and container gangs was a total of 326 blacks and 61 whites for a percentage of 84.23 black and 15.76 white. In 1973, it was 405 blacks and 81 whites, a percentage of 83.7 black and 16.3 white. This also does not present a picture of racial discrimination in our view.

(5) Deck Jobs in General Cargo Crews

A general cargo crew is made up of sixteen members, of which eight men work in the ship's hold and the balance work on deck—at jobs such as derricksmen, pilemen, hook-on men, driver and winchmen. Deck jobs pay no higher than those in the hold, but they are considered preferable to the hold jobs in that they are less physically demanding. Plaintiffs contend that the twelve defendant companies that employ regular general cargo gangs discriminate against blacks in connection with assignment to preferred deck jobs. Once again, plaintiffs talk in terms of the number of blacks on the waterfront rather than the percentage of blacks holding these "preferred" jobs. The following is their statistical analysis:

Proportion of White and Black Members of All General Cargo Gangs Assigned to Deck Jobs, December 1973

	Number in all Regular General Cargo Gangs	Number in Deck Jobs	% in Deck Jobs
White	188	162	86.2%
Black	1,242	542	43.6%

However, if one looks at the overall picture presented by the major defendant companies during a five-year period, the view is not as bleak:

Number of Regular Gang Members by Race
In Deck and Wharf Jobs in Regular Company Gangs

Company	Gang Postion	March 1965		March 1970	
	Winchmen, Derricksmen, Hook-on Men Lift Operators, Pile Men	White	Black	White	Black
Atlantic & Gulf	"	31	57	53	106
Gulf	"	21	19	9	39
Louisiana Stevedores	"	21	27	24	44
N.O. Stevedoring	"	109	59	76	92
Florio	"	32	40	30	32
Lykes Bros.	"	64	61	39	72
Strachan Shipping	"	27	53	20	60
T. Smith & Son	"	84	189	52	214
Ryan Stevedoring	"	66	46	17	37

This table indicates a definite trend of a steady movement of black longshoremen into "preferred work" of deck and wharf jobs and, as the evidence shows, on the basis of gang longevity and individual ability to perform the work.

II. Racial Discrimination in the Selection and Assignment of Supervisors

Superintendents and Foremen

The superintendents constitute the level of supervision above foremen and their gangs. They hire the necessary foremen and their gangs each day and assign them to a particular ship. They are regular salaried company employees. The plaintiffs minimize the situation when they state that some overly industrious longshoremen and foremen make more money than superintendents, but that the latter's job has the advantages of regularity of income, status and authority.

Plaintiffs assert that ten of the defendant companies discriminate in the hiring of superintendents in that none of the companies has ever hired more than one black superintendent and only three had a black superintendent at the time of trial. There was evidence that a number of black foremen have been offered and refused jobs as superintendents since 1968. However, a comparison of 1973 average earnings of men who became superintendents since 1968 to the 1973 average of these black foremen indicates an average of $14,544.48 for superintendents to an average of $23,178.56 for foremen. Apparently, there is a greater desire to work for a larger amount of money than regularity of income, status and authority. Plaintiffs presented no evidence to rebut this conclusion.

With respect to foremen, plaintiffs contend that defendants Atlantic & Gulf, Dixie, J.P. Florio, Louisiana Stevedores, Lykes, Mid-Gulf, T. Smith and J. Young discriminate in the hiring of regular foremen. This is based on the fact that although the pool of longshoremen from which the regular foremen are selected is over 75% black, as of July 1974 blacks constituted 50% or less of the regular foremen of these companies. First, we reiterate that we are more interested in the trend in hiring of regular foremen in the entire industry as indicating whether there is a continuing pattern or practice of discrimination. The evidence indicates that the number of regular foremen by race of defendant companies in 1972 was 50 black and 93 white, in 1973 there were 68 black and 88 white. This indicates a constant increase in black foremen and a decrease in white. Earnings have also improved with black foremen earning an average of $11,575.44 in 1972 as compared to a white average earning in that same year of $12,225.27. In 1973, the evidence indicates that black foremen earned an average of $14,975.25 to a white average earnings of $13,527.61. (NOSA Exhibits 84 and 85.) Additionally, as of June 1974, 50 blacks and 42 whites had become regular foremen with their companies since 1968. (NOSA Ex-

hibit # 89.) Once again, this indicates a discernable improvement for blacks and, from raw data, it is impossible to gauge the effect of seniority on this situation. The most encouraging thing is that blacks have been steadily increasing their proportionate share of regular foreman positions.

Plaintiffs also point to a number of companies that discriminate in the hiring of extra or non-regular foremen. These men are hired by a company when there is more work than can be done by the company's regular foremen and gangs. The list of these companies includes seven of the eight charged with discrimination in the hiring of regular foremen, with Dixie not being included, but adds three other companies to the list that discriminate in hiring non-regular foremen. Gulf, New Orleans Stevedores and Ryan. We agree with the defendants that there is no logic to the contention that some companies do not discriminate in the hiring of regular foremen, the more desirable job, but do discriminate in the hiring of non-regular foremen. And, furthermore, in most cases this discrimination is done by the same stevedore superintendent. We reject this aspect of plaintiffs' case out of hand.

The Court is aware of the fact that it is "...well established that courts must...examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists" in a particular industry under court scrutiny. *Brown v. Gaston County Dyeing Machine Company,* 457 F.2d 1377, 1382 (4th Cir. 1972), *citing United States v. Jacksonville Terminal Co.,* 451 F.2d 418, 442 (5th Cir. 1971). However, when relying on statistics to make out a *prima facie* case for the plaintiffs, courts look for a large statistical imbalance plus a strong factual background of discrimination. *Roman v. ESB, Inc.,* 550 F.2d 1343, 1353 (4th Cir. 1976). We do not think that the disparities in the statistical analysis presented by the plaintiffs is sufficient to serve as the basis for a conclusion that racial discrimination is being practiced. We think that there are too many variables in the longshore industry

as constituted in the Port of New Orleans which are not encompassed by statistics. These have been pointed out by the unions as including (1) the nature of the work, in that individual employees are not compelled to work every day and many can earn a decent living by working premium hours only when they want to; (2) even those who do work regularly can achieve maximum earnings and work hours by a willingness to work additional hours to earn premium pay; (3) a certain amount of skill at working certain cargoes or performing certain tasks is subjectively taken into account by superintendents when hiring foremen and their gangs; (4) it is difficult to calculate the effect of the large number of casuals who drift into and out of work on the waterfront on racial distribution of work. It appears to the Court that NOSA and its member companies are willing and actively working at complying with Title VII, as indicated by the terms of the Settlement Agreement entered into, and also that there is a trend in job improvement of blacks in the longshore industry. At this point, we can find no broad pattern or practice of racial discrimination. *See Bailey v. Ryan Stevedoring Co., Inc.* 528 F.2d 551 (5th Cir. 1976).

III. Segregated Locals

In spite of all that we have just said, the Court does not intend to give the impression that there is no more room for improvement of the black longshoreman's position in the Port or to minimize the effect of this suit or its importance. If nothing else, as we have previously indicated, it may well have been responsible for a change in the allocation of grain work and the elimination of the 50-50 practice previously in practice. More importantly, it has brought to issue the question of whether two separate unions, one predominately for black longshoremen and one for white longshoremen, should exist in the Port of New Orleans. Section 703 (c)(2) of the 1964 Civil Rights Act states: "It shall be an unlawful employment practice for a labor organiza-

tion . . .to limit, segregate, or classify its membership or applicants for membership . . .in any way which would deprive or tend to deprive any individual of employment opportunities . . .because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e—2(c)(2).

Locals 1418 and 1419 are jointly certified by the National Labor Relations Board as the collective bargaining representatives of longshoremen on the New Orleans waterfront. They represent two locals with identical jurisdiction which appear to have no other purpose for existence than the segregation of the black and white races. The segregated locals are chartered by defendant I.L.A. Locals 1802 and 1683 also are jointly certified by the National Labor Relations Board as the collective bargaining representative of sacksewers, sweepers, waterboys and coopers on the New Orleans waterfront. Here, too, there are two locals with the same jurisdiction, once again the only difference being that the locals are segregated on the basis of race. These two locals are also chartered by defendant I.L.A. As pointed out by the plaintiffs, the International Longshoremen's Association is the only major union in the United States that has not voluntarily undertaken to disestablish racially segregated unions within its jurisdiction. The relevant cases where this condition has been remedied by the courts are *United States v. International Longshoremen's Association,* 460 F.2d 497 (4th Cir. 1972), the Port of Baltimore; *EEOC v. International Longshoremen's Association,* 511 F.2d 273 (5th Cir. 1975), the Port of Texas; *Bailey v. Ryan Stevedoring Co., supra,* the Port of Baton Rouge.

In the face of strong oppositin from both locals to merger and also to this Court's finding that plaintiffs have not proved present discrimination, we are now faced with the problem of deciding at this stage of the proceedings whether Locals 1418 and 1419 should be required to merge and whether locals 1802 and 1683 should also be required to merge. The Court is of the opinion that it should so require the merger, either

because these racially segregated unions are in violation of 42 U.S.C. § 2000e—2(c)(2) in that they "tend" to deprive individuals of employment opportunities or because segregated locals are a *per se* violation of the Act under the language quoted above. Even though the grain clause has been deleted from the current Deep Sea Agreement, we think that it is just one of several examples presented by this case as to how the existence of two segregated unions can tend to deprive individuals of work because of the tendency of this situation to fragmentize the industry on the waterfront. As long as to the two separate unions exist in each case, another situation can arise where it is felt desirable to "keep things even," half for one union and half for the other. Even the 75%—25% ratio which appears to have emerged has the effect of dividing work according to race because the unions are segregated. When two unions share work there is ordinarily no problem. However, when the unions are substantially segregated, *any* allocation of work between them necessarily involves a division of work according to race—because race forms the basis for membership in the union. The division of the LASH work is yet another example of how these two unions are a ready-made division for splitting work, even though the division is not done on a per-employee basis and, therefore, not necessarily equitable as far as the individual workers are concerned. A third situation exists. The Deep Sea Agreement establishes three management-labor committees to administer the contract. Under its Article XIV, dealing with "Working Regulations," it establishes a Methods Committee which has the authority to approve changes in the working procedures on the waterfront as established by the contract. Article XVII, which prohibits strikes and mandates arbitration of disputes, establishes a permanent Disputes Committee which constitutes the second step of the procedure for the resolution of all disputes involving the interpretation or application of the Agreement. Article XXIII establishes a management-labor committee to

police abuses of the Guaranteed Annual Income Plan. By the terms of this contract, each of these committees is made up of four members, two from the Association and *one* from each local. Here is yet another example where each union is treated as being equal. Defendants argue that none of the committees have either met or taken any action which could have had any effect on either union. We find this immaterial, as we do the fact that the grain clause has been deleted and that mid-Gulf no longer enforces the requested LASH/vessel work quota. In the *Bailey* case, the court pointed out, *supra* at 556, that the hiring of longshoremen of the segregated locals on the basis of a 50%—50% rule was a practice which had "discriminatory potential." Even though the district court had found that for the last nine years the membership of the two locals had been quite comparable, *Bailey v. Ryan Stevedoring Co.*, 7 EPD ¶ 9424 at p. 7869 (M.D.La. 1974), the Fifth Circuit found that the 50%—50% hiring practice represented a threat of employment discrimination that violated 42 U.S.C. § 2000e—2(c)(2). We think that our situation is analogous to the *Bailey* case since the tendency exists for discrimination in both cases based on past situations, even though under the present situation in both cases no real harm is presently experienced.

However, there is one difference between the present case and *Bailey*. In *Bailey*, the Fifth Circuit Court of Appeals found that the 50%—50% division was a practice which was discriminatory. There is no practice still in effect which has been demonstrated to this Court to be discriminatory at this time. However, even if we are incorrect in concluding that some former discriminatory practices, involving the division of work between the unions which were in effect until recently, still have the tendency to create a potential for discrimination, then we find that maintenance of Locals 1418 and 1419 and maintenance of Locals 1802 and 1683 are *per se* violations of Title VII.

Before going into the question of the uncertainty of the law in the Fifth Circuit, we note that two other

circuits have held that segregated locals are *per se* unlawful. See, *United States v. International Longshoremen's Association, supra; Evans v. Sheraton Park Hotel,* 164 U.S.App.D.C. 86, 503 F.2d 177 (1974). There is no such direct holding from the Fifth Circuit, although there is no contrary holding. In *United States v. Jacksonville Terminal Company, supra,* the court, after determining that plaintiffs had proven that the defendants had committed specific acts and practices of racial discrimination in employment since the July 2, 1965, effective date of the Civil Rights Act, turned its attention to the fact that two segregated locals existed as separate entities with respect to Terminal work. The court concluded that, in view of the racial discrimination which had been proved in light of the total employment picture, "[t]he record clearly discloses that the existence of 'separate but equal' locals has had, and may continue to have post-Act deleterious effects on blacks." Consequently, the court found a direct violation of 42 U.S.C. § 2000e—2(c). Subsequent to the *Jacksonville Terminal* case, the Fifth Circuit again faced the question of the legality of maintaining segregated black and white unions. *EEOC V. International Long. Ass'n,* 511 F.2d 273 (5th cir. 1975). In this case, the main holding appears to be that since it was shown that the segregated locals had had actual discriminatory effect on employment opportunities, merger of them was mandatory. (451 F.2d at 457.) although one of the judges of the three-judge court, Judge Goldberg, attempted to find a *per se* violation, Judges Thornberry and Godbold did not feel the need to and in their concurring opinion stated at P. 280: "If a case ever comes to us with a finding by the district court that no actual employment discrimination arose from segregated locals, we may then properly consider the necessity for a rule of *per se* illegality." It is this language which gives us pause and brings us into a consideration of the issue of *per se* illegality. We view our case as one where employment discrimination arose once and could, in the future, arise from segre-

gated locals but it has not been demonstrated that it presently exists. After the *International Longshoremen's Association* case, the Fifth Circuit decided *Local* No. 293, *etc. v. Local* No. 293—A, 526 F.2d 316, 317 (5th Cir. 1976). The plaintiffs in this case alleged that the defendant local had discriminated against them on the grounds of race, for which relief was sought, and, in addition to this, plaintiffs raised the issue of the merger of segregated unions. The district court, without an evidentiary hearing and on the sole basis of the record, ordered merger of the two unions, reserving ruling on the damage claim until after a trial on the merits. The case was appealed to the Fifth Circuit on the issue of whether Title VII was applicable to the defendant local. The Fifth Circuit reversed on the basis that the district court was in error in denying the motion of defendant to dismiss for lack of jurisdiction. After this conclusion, the court in *Local 293 v. Local 293—A, supra* at 319, stated as dictum in a footnote that although the district court found no actual discriminatory effect on employment opportunity, "[s]hould jurisdiction subsequently be found . . .the plaintiffs must demonstrate such discriminatory effects." Although this language is stated to refer to the fact that the court pretermitted a decision on the validity of the lower court's grant of partial summary judgment on this issue of segregated unions, we are not convinced that the footnote statement resolves the issue at hand. In the later case of *Bailey v. Ryan Stevedoring Co., Inc., supra,* as noted by plaintiffs, the Court of Appeals cited the *Local 293* decision, but stated, as previously referred to, that the *per se* issue had not been decided by the court yet. Furthermore, following the three-judge court decision in *Bailey,* a poll of the entire court was taken on the ILA's petition for rehearing *en banc.* This petition was denied, *Bailey v. Ryan Stevedoring Company, Inc.,* 533 F.2d 976 (5th Cir. 1976), by a vote of 13 to 1. Judge Clark, as the lone dissenter, argued that, in light of the district court's uncontradicted finding that there had been no discriminatory effects, the panel's

reliance on "future contingencies" was wrong. He "[construed] the panel opinion to override the vital associational rights involved in the case *on the basis of legal deductions* that are contrary to the facts and to valid prior precedent in this circuit." (Emphasis added.) *Supra* at 976. We agree with plaintiffs that it appears that Judge Clark, himself, concluded that the panel's reliance on "future contingencies" amounted to a rule of *per se* illegality.

Judge Clark also stated in the panel consideration of *Bailey, supra* at 977, that the appellate court had mandated the district judge "to grant Bailey's motion to force the merger of two independent union locals who do not want to merge." The two locals in our case also do not want to merge. Nor did the locals wish to merge in *United States v. Jacksonville Terminal Company, supra,* or in *EEOC v. International Long. Ass'n, supra.* In the opinion of the lower court in the latter case, *United States v. International Longshoremen's Ass'n,* 334 F.Supp. 976, 978 (S.D.Tex.1971), the district court pointed out that black union officials urged the court not to order merger, insisting that "...the negroes, by having their own unions and their own union officials, have been able to better themselves by being able to hold high positions in their locals, and have been recognized in the community as a separate, powerful voice for the Negro communities, and has attained for them and the Negro people of the Community, a standing which they could not have otherwise attained." The Defendant Local 1419 argues, along the same lines in the instant case, that it is larger, wealthier and better manned than Local 1418, better services its members' needs than Local 1418, provides substantial benefits which the latter does not and cannot provide and is free from substantial debt, unlike 1418. In the words of Local 1419's attorneys:

> Over the years, Local 1419 has regarded itself, and has been regarded by others, as a special spokesman and leader of the black community both on the waterfront and in economic, social and political

> affairs generally. It has used its resources and the energies of its officers and members to promote a wide variety of black educational, social and political programs in an effort to improve the lot of the black community. Local 1419 is a potent force on behalf of blacks in New Orleans and Louisiana.

By our decision, we do not mean to imply that the foregoing attitude is not a noble endeavor, but we doubt that it is one which ought to be pursued under the direct auspices of a labor union. Other courts have recognized the validity of the anti-merger position but have rejected this argument against merger. In *United States v. International Longshoremen's Ass'n, supra* at 978, the district court countered that " . . .the ultimate issue before the Court is whether this pattern or practice of having segregated locals is keeping longshoremen, be they Black or White, from equal working opportunities on account of a longshoremen's race or national origin." And the Fifth Circuit countered in the *Jacksonville Terminal case, supra* at 457 that:

> Contrary to the allegations made by the Unions, we find that their locals are not mere "social clubs," having no influence in national union policy or practice. We conclude that the District Court erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act, 42 U.S.C.A. § 2000e—2(c).

The effect of dual unions is described by both Judge Goldberg, in *Bailey,* 451 f.2d at 457, and by the Fourth Circuit in *United States v. International Longshoremen's Association, supra* at 500, to the effect that representatives of separate unions charged with only serving that union cannot be realistically expected to act strongly on behalf of the other union and, consequently, both conclude that agreements between labor and management emerging from bargaining by one union on behalf of all longshoremen rather than one charged with serving white employees and the other with serving black employees will better the employment status of all employees. For this reason, this

Court concludes that each of the two locals should be merged.

The foregoing represents this Court's findings of fact and conclusions of law in this case. Let judgment be entered accordingly.

APPENDIX B

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS
STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

MINUTE ENTRY ON MOTION
FOR RECONSIDERATION

June 30, 1980

Subsequent to the Court's decision in this case, reported as *Williams v. new Orleans Steamship Association*, 466 F.Supp. 662 (E.D.La.1979), plaintiffs filed a motion for reconsideration of the grain cargo issue. Plaintiffs seek two things: (1) to have the Court certify a class, pursuant to Rule 23(b)(2), F.R.Civ.P., composed of members of ILA Local 1419 who, subsequent to May 29, 1967, worked or sought work on the New Orleans waterfront and who were not regulars in grain cargo gangs; (2) to find liability on the part of the defendants to the class with respect to the allocation of grain cargo work. Plaintiffs, in their supporting memorandum, state that they have limited the motion under submission to the grain cargo issue because in this "one instance the Court appears to have accepted plaintiffs' contention that the challenged practice was racially discriminatory." It is their position that the allocation of work under the terms of the grain clause was racially discriminatory and that, under the authorities, it is clear that defendants are liable for back pay for the earnings lost as a result of this violation.

The question of the racially discriminatory effect of the grain cargo clause raises two issues. The first has to do with the existence of two racially segregated unions. In our previous decision, we made a clear finding that the grain clause was inserted in the Deep Sea Agreement between the unions and NOSA at the insistence of the officers of the black union in order to protect the members of that union. Although we noted, at p. 673, that the division of grain work on a 50-50 basis was discriminatory under the circumstances, we noted that the evil in the situation was that it was accomplished through a segregated union system.[1]

[1]We stated, at p. 673, that the division of grain cargo work under the grain clause was discriminatory. In the context of our opinion this obviously referred to discriminatory potential. On the record of this case this Court could not have found that the individual plaintiffs had carried their burden of proving either their individual claims or class claims. In fact, at p. 672, we found that "plaintiffs have not proved employment discrimination in the specific areas they have delineated which is applicable to a specific group of employees similarly situated and generally acted upon by the defendants with respect to an applicable class." And, at p. 667, we specifically designated as a specific area "racial discrimination in preferred work assignments, i.e., longshoremen assigned to grain crews. . . ."

The Court never found that the existence of the clause was a violation of Title VII. We condemned the clause, at p. 678, as establishing "a practice which had 'discriminatory potential.' " At this point, we were specifically concerned with the maintenance of segregated local unions. Our specific holding was that the existence of segregated unions, because they constituted a built-in *threat* for employment discrimination, was in violation of Title VII, 42 U.S.C. § 2000e-2(c)(2). It was for this reason that we enjoined the practice of maintaining separate segregated locals and ordered that they be merged.

In our decision, we cited and heavily relied on the case of *Bailey v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551 (5th Cir. 1976), in which the Fifth Circuit held that defendant's practice of dividing longshore work on a 50-50 basis between the two segregated local longshore unions represented "a possible future threat of discrimination." However, the Fifth Circuit upheld the trial judge in denying relief on the individual or class action claims. On appeal from the district court's disposition on remand, the Fifth Circuit again reconsidered the merger issue in *Bailey*. It held that the failure of plaintiffs to prove their individual claims did not deny them standing to challenge the segregated union system on the basis of the "threat of employment discrimination." *Bailey v. Ryan Stevedoring Co., Inc.*, 613 F.2d 588, 590 (5th Cir. 1980). It was in this manner that we, also, treated the segregated local unions, using the grain clause as evidence of the threat of discriminatory treatment.

The second issue is the impact of the grain cargo clause on black longshoremen. We believe that our decision adequately discussed the issue of class certification with respect to grain cargo work and subsequent liability for the alleged discriminatory allocation of it. (The issue was raised at p. 667 and decided by the Court in its decision at pp. 676-677.) However, on reexamination of the issue we reach the same result.

As proof of the asserted discriminatory effect

caused by the 50-50 allocation of grain work, plaintiffs point out that in the contract years of 1970-71, 1971-72 and 1972-73, there was almost $8 million worth of grain cargo work performed on the New Orleans waterfront and that black longshoremen received only 49.9% of it. They, therefore, conclude that because premiums of up to 40 cents an hour are paid for grain cargo work [In our decision, see p. 673, we found a 20 cent per hour premium for such work.], this clearly establishes economic loss to blacks as a result of the allocation on racial lines, regardless of the availability of longshore work at *regular rates.* However, this ignores the fact that there are premium rates for other types of work besides that for grain cargo. This includes special kinds of work, such as, meal time, night work, weekends, damaged cargo, explosives, etc. And, as pointed out by the defendants, by not including them in the statistical picture, the possiblility of an inaccurate distortion exists. We agree with defendants that plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. No longshoremen works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall. We demonstrated this in our decision, at p. 667, with the reproduction of the chart comparing earnings for black and white longshoremen for the contract year 1972-73. This chart showed blacks holding their own. There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think that the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of plaintiffs to have the Court certify a class

composed of members of ILA Local 1419 who, subsequent to May 29, 1967, worked or sought work on the New Orleans waterfront and who were not regulars in grain cargo gangs, and to find liability on the part of the defendants to such a class with respect to the allocation of grain cargo work is hereby DENIED.

Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

**NEW ORLEANS
STEAMSHIP ASSOCIATION, ET AL**

**CIVIL ACTION
NO. 71-873
SECTION "B"**

September 5, 1979

JUDGMENT

On the basis of this Court's Findings of Fact and Conclusions of Law, entered February 14, 1979, and on the basis of this Court's Minute Entry and Order, entered August 23, 1979, Judgment is hereby entered, as follows:

IT IS ORDERED THAT defendant ILA General Longshore Locals 1418 and 1419 and defendant ILA Sacksewers, Sweepers, Waterboys and Coopers Locals 1802 and 1683 be merged, each pair, into one integrated local by October 31, 1979.

IT IS FURTHER ORDERED THAT on or before November 30, 1979, counsel for the defendant local unions shall file with the court, and serve on opposing counsel, a statement describing the implementation of this Judgment.

This Judgment applies only to the issue of the merger of local unions raised in this action. Issues as to the entitlement of plaintiffs to attorneys' fees and costs, pursuant to 42 U.S.C. § 2000e—5(k), as to this issue are deferred until after entry of judgment on the remaining issues in this case.

Done this 4th day of September, 1979, in New Orleans, Louisiana.

Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

October 1, 1980

JUDGMENT

This action came on for trial before the Court, and the issues having been duly tried, a decision having been duly rendered, and plaintiffs' motion for reconsideration having been denied.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, except as stated herein and except as stated in this Court's Judgment in this action entered September 5, 1979, the plaintiffs take nothing from the New Orleans Steamship Association and/or its member companies and the action be dismissed on the merits as to these defendants. Defendant New Orleans Steamship Association and its member defendants shall bear their own costs. The Court will entertain an application by plaintiff, filed on or before October 31, 1980, for an award of costs, including attorneys' fees, against the union defendants, pursuant to 42 U.S.C. § 2000e—5(k), reserving to the union defendants any and all defenses they may have to the request by plaintiffs for attorneys' fees.

Dated: October 1, 1980

Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX E

George James WILLIAMS, et al
Plaintiffs-Appellants

v.

NEW ORLEANS STEAMSHIP ASSOCIATION, et al., Defendants-Appellees

No. 80-3886

United States Court of Appeals
Fifth Circuit

April 9, 1982

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Plaintiffs George Williams, Duralph Hayes, and Ernest Turner, Jr. and intervenors Matthew Richard and John Aaron sued New Orleans Steamship Association (NOSA), sixteen[1] of its member stevedoring companies, Locals 1418 and 1419 General Longshore Workers, International Longshoremen Association (ILA), and Locals 1802 and 1863 Sacksewers, Sweepers, Waterboys, and Coopers, ILA, alleging individual and class-wide employment discrimination in the Port of New Orleans in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981.[2] After an eighteen day trial, the court ordered the merger of the previously segregated Locals 1418 and 1419 and Locals 1802 and 1863 but dismissed the remainder of plaintiffs' claims and refused to certify a class pursuant to Fed.R.Civ.P. 23. In this appeal, plaintiffs contest the court's dismissal of their claims of discrimination in the allocation of grain work and in the assignment of preferred positions in general cargo gangs as well as the court's refusal to certify a plaintiff class. We hold that the court erred in denying plaintiffs' claim concerning the allocation of grain work and in refusing to certify a class with respect to that claim. We affirm the dismissal of the discriminatory assignment claim and the court's refusal to certify a class in that instance.

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1. NOSA is composed of 62 stevedoring and shipping companies. Originally, thirty-two companies were named as defendants, but plaintiffs voluntarily dismissed charges against sixteen companies prior to trial.

2. Although there are differences between Title VII and § 1981 actions, *i.e.* statute of limitations and remedies available, those differences are not present in the issues considered in this appeal. Therefore, when we refer to either statute, our reasoning encompasses the other as well, unless we specify otherwise.

I. FACTS

The district court's opinion amply describes the factual background of this eleven year old case. See *Williams v. New Orleans Steamship Association*, 466 F.Supp. 662 (E.D.La.1979). Because this appeal concerns the employment practices in particular areas of the stevedoring industry, it is necessary to describe briefly the operations of the industry in the Port of New Orleans.

Originally, employment on the waterfront was casual and unsystematic. After a 1974 Department of Labor study, a registration system was instituted. Today, waterfront workers are categorized by craft and registered accordingly. Each craft is under the jurisdiction of a different ILA local.

This appeal involves alleged discrimination against Craft I workers. Craft I is comprised of general longshoremen previously under the jurisdiction of Locals 1418 (white) and 1419 (black),[3] now under the jurisdiction of the merged Local 3000. Within each craft, workers are classified according to their priority for employment opportunities based upon their length of service with a particular company. The highest ranking categories are considered "registered" (as opposed to "casual") and comprise the majority of longshoremen. Throughout the relevant time period,[4] approximately 75% of all registered longshoremen were black. Thus membership in Local 1419 was three times

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3. At the time of trial, Local 1418 was more than 99% white and Local 1419 was all black. The district court found the maintenance of segregated locals violated Title VII because of the potential for discrimination created by dual unions. The court ordered their merger. 466 F.Supp. 662, 680 (E.D.La.1979). Merger was accomplished in 1980.

4. The relevant time period for the Title VII claim began in September, 1967, 180 days before the first charge was filed by plaintiffs with the E.E.O.C. *See McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981). it began on March 30, 1970 for the § 1981 claim. *Pegues v. Morehouse Parish School Board*, 632 F.2d 1279, 1281 (5th Cir. 1980), *cert. denied*, 451 U.S. 98[illegible], 101 S.Ct. 2322, 68 L.Ed.2d 844 (1981) (§ 1981 claim of employment discrimination is subject to Louisiana's one year statute of limitations. La.Civ. Code Art. 3653).

as great as that of Local 1418.[5]

Longshoremen load and unload ships. The work is performed on a day-to-day basis, seven days a week. Stevedoring companies hire longshoremen daily through the Waterfront Employment Center owned and operated by NOSA. The workers are organized into "gangs" of varying size, depending on the type of cargo to be loaded or unloaded. Typically, grain gangs employ eight men and general cargo gangs sixteen. Pay rates for the various jobs are set out in the Deep Sea Agreement negotiated between NOSA and the Locals.

Hiring is done twice daily at "shape-ups." Each stevedore chooses a foreman for each gang needed that day and the foreman then hires the necessary gang members. Many companies have "regular" gangs comprised of registered longshoremen who frequently work for that company and are given preference on available work. If a company has more work than can be handled by its regular gangs, it employs "non-regulars" who are either regulars with other companies or "casuals" not associated with any particular company. This results in all longshoremen working for virtually all the stevedores at one time or another. Although many workers become associated with a particular company from time to time, none works exclusively for one company.

Despite the registration system, employment is still largely casual. The work performed by a longshoreman varies from day to day depending on a variety of factors including the work available as well as personal choice. Longshoremen are not required to work any particular days or hours. If they want to work, they simply come to a shape-up. The rates of pay vary for different jobs and different shifts. For example, in 1973, grain work paid a 20¢ per hour premium. Work performed during mealtimes, weekends, and holidays also pays a premium. A longshoreman may choose to shape-up only when there is a certain

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5. At the time of trial, Local 1418 had 750 members, 744 of whom were white. local 1419 had 3608 members all of whom were black.

type of work available or only during certain hours. Thus the longshoreman's job and wages are determined in part by personal factors.

The employment relationship ultimately is controlled by the Deep Sea Agreement which specifies the terms and conditions of employment and the varying wages for each job. In this appeal, plaintiffs contest the employment practices concerning the allocation of grain work and the job assignments in general cargo gangs. Before 1974, the Agreement required that so far as practicable, grain work should be divided evenly between Locals 1418 and 1419, notwithstanding their disproportionate memberships.[6] There was no corresponding provision respecting assignments in general cargo gangs; plaintiffs contest an alleged practice by white foremen of assigning white longshoremen to the more preferable jobs.

II. ALLOCATION OF GRAIN WORK

A. Separate Claim of Racial Discrimination in Grain Work.

Grain work comprises approximately 8% of all longshore work and involves the loading and unloading of ships carrying grain. It is physically less demanding than other types of work because the cargo is pumped rather than carried onto and off of vessels. Grain workers often become covered from head to toe in grain and inhale particles, however, and because of this unpleasantness, a premium is paid for grain work.

Pursuant to the Deep Sea Agreement, grain work was allocated equally between the members of the black and white locals. Plaintiffs contend that this practice violated Title VII and § 1981.

The district court's original order in this case, dated February 14, 1979, 466 F.Supp. 662, was five years after the trial. In that order, the court found that the 50-50 allocation of grain work was discriminatory,

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6. This clause was eliminated by agreement of NOSA and the Locals in 1974.

yet it did not find a violation of Title VII. Upon plaintiffs' motion for reconsideration of the issue, the court clarified by saying its earlier holding meant that the contract clause requiring 50-50 allocation was not discriminatory but that it was evidence of the discriminatory potential inherent in a system that maintained segregated local unions.

The court then reconsidered plaintiffs' allegation that the practice of 50-50 allocation was discriminatory in and of itself. Again, the court did not find a violation of Title VII. This time its conclusion was based upon its finding that, because longshoremen perform more than one type of work, evidence focusing on only one of these jobs, *i.e.*, grain work, would distort the analysis. "The important thing is how [the black longshoremen] fares overall." The court then considered the overall welfare of black longshoremen and concluded that in the Port of New Orleans, they received their proportionate share of work and pay. Thus the court found no discrimination.

[1, 2] An appellate court must accept a trial court's findings of subsidiary facts unless clearly erroneous; however, the court's ultimate finding on the issue of discrimination is subject to review free of the clearly erroneous standard. *Wright v. Western Electric Co.*, 664 F.2d 959, 963 (5th cir. 1981). Furthermore, this Court is not bound to any degree by the district court's conclusions as to the law, *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (5th cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979), nor are we bound by findings of fact based upon erroneous applications of law, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 422 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981). We find that the district court's opinion was based upon an erroneous legal conclusion as to the viability of plaintiffs' grain claim. Thus our review of the court's findings of fact is not bound by the clearly erroneous standard of Fed.R.Civ.P. 52(a).

[3] In concluding that the plaintiffs failed to prove discrimination, the district court misconstrued plain-

tiffs' allegation. By comparing the overall economic picture of blacks and whites, the court transformed plaintiffs' claim of discrimination in the allocation of grain work into a claim of discrimination in the entire industry.[7] The court erroneously concluded that plaintiffs' segmented claim was not cognizable under Title VII and § 1981.

[4] Claims alleging discrimination in only one segment of an employer's workforce are cognizable under Title VII and § 1981. The Supreme Court recognized this principle in one of the landmark Title VII cases, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). There, the United States brought suit on behalf of blacks and Spanish-surnamed persons against a large trucking company and the union which represented its employees claiming that the company engaged in a pattern or practice of discrimination in the hiring of line drivers. Minorities who were hired allegedly were relegated to the lower paying, less desirable positions and met with insurmountable difficulties in trying to gain promotions and transfers.

The government's case consisted of powerful statistical evidence showing a gross disparity between the percentage of minorities in the company's workforce as a whole and those in line driver positions. Those statistics, coupled with the testimony of individuals who recounted over forty specific instances of discrimination, established the government's prima facie case. The company was unable to rebut this evidence, and

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7. We also note that the district court's statistical analysis concluding that black overall fared as well as whites is flawed. The chart showing these figures is derived from defendant NOSA's exhibits and contains a comparison between earnings of the 702 highest paid blacks and whites which reveals higher earnings for blacks. See 466 F.Supp. at 667. Actually, the court states that the comparison is based upon the 600, rather than 702, highest earners of each race. As both parties point out, the data in fact encompasses the 702 top earners of each race. During the period reflected in the chart, there were 702 white and over 2100 black longshoremen. Thus, this chart ignores the earnings of approximately 1500 blacks. All the chart shows is that man for man from the top down, 702 of 2100 blacks fared at least as well as all whites. A better comparison would have been between the average earnings of *all* black and *all* white longshoremen.

the government prevailed on the issue.

Line drivers only comprised approximately one-fourth of the truck driver positions, yet the Court recognized the validity of the departmentalized claim. The Court did not look to the overall picture of minorities within the company's employ to determine the validity of the claim. Minorities may have fared overall as well as their white counterparts, yet the Court did not consider this factor in evaluating the evidence. The government was permitted to charge discrimination in one job classification only and to prove its case by offering statistical evidence relevant only to that job.

In determining whether a particular claim of discrimination in only a segment of an employer's work force is cognizable the operative factor must be the distinctiveness of the segment. In *Teamsters, supra,* the duties and compensation of line drivers differed from those of other driver positions and thus line drivers constituted a distinct job classification.

A similar distinction exists between grain work and other types of longshoring jobs in New Orleans. The tasks performed by grain workers differ from those performed by other longshoremen because of the nature of the cargo involved. Furthermore, the Locals and NOSA traditionally have treated grain work separately from other types of longshore work, as evidenced by the Deep Sea Agreement. The hourly wage paid for grain work is negotiated separately from other types of work.[8] The mode of allocating jobs evenly between the black and white Locals was also unique to grain work. Thus, while longshoremen can and do perform a variety of jobs, the distinctiveness of grain work makes plaintiffs' claim of discrimination in this one area of employment viable under Title VII and § 1981.

In fact, the court below recognized the validity of segmented claims within the industry in New Orleans.

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8. The fact that the wage is the same as that paid for some other job situations does not change our conclusion that the grain wage is a separately bargained-for part of the Agreement. Grain work has traditionally carried a premium of at least 20¢ per hour over the basic longshoring rate.

Although it refused to consider plaintiffs' claims of discrimination in the allocation of grain work, it permitted similar segmented claims with respect to other sectors of the industry. A clear example is the court's consideration of plaintiffs' allegation of discrimination in job assignments in general cargo gangs. Although the court ultimately rejected plaintiffs' claim on the merits, it recognized the segmented claim and considered statistics relevant only to general cargo gangs, not the entire industry.

Furthermore, both logic and the policies underlying Title VII dictate the conclusion that a segmented claim is cognizable. Title VII proscribes racial discrimination of any kind in virtually all aspects of employment. There is nothing in the Act to indicate that a claim for discrimination in one distinct category of employment within a plant, industry or office, or even in one job, is not cognizable.

Were we to accept defendants' contentions, we would be ruling in effect that an employer may discriminate with impunity as long as it confines such action to some units or departments within the workforce while maintaining an overall facade of equality. An employer guilty of plant or industry-wide discrimination may be a worse offender of Title VII than one who discriminates in only a single department. The remedies awarded to the former's employees as well as the penalties assessed against it may be greater than those imposed upon the latter. As to liability, however, both are equally subject to the prohibitions of Title VII.

The cases relied upon by defendants in support of the judgment below are unpersuasive. None of these cases involved the question of whether a segmented claim may be brought against an employer. In *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976), *cert. granted* (after an earlier remand), 451 U.S. 906, 101 S.Ct. 1972, 68 L.Ed.2d 293 (1981), plaintiffs alleged that the defendant engaged in a pattern or practice of racial discrimination in departmental assignments within its production plant. To prove their claim,

plaintiffs offered statistical evidence of racial disparity in nine of the twenty-eight departments. We discarded the proffered analysis because it focused on only nine of twenty-eight departments. 539 F.2d at 94-95. Instead, we held the proper statistical focus should have encompassed the entire plant and thus plaintiffs' evidence of racial imbalances in a *segment* of the plant was insufficient to establish a prima facie case of *plant-wide* discrimination.

In *E.E.O.C. v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978), plaintiffs raised a claim of racial discrimination in hiring and job assignments. They introduced statistical evidence showing gross imbalances in some job categories, but no evidence as to the employer's workforce as a whole. The district court rejected this as proof of a prima facie case. We upheld its decision stating that while "plaintiffs' statistical evidence alone might be sufficient to infer discrimination in these job categories . . .[to prove] a *prima facie* case of racial discrimination, such statistics must be relevant, material and meaningful . . ." 570 F.2d at 1269. Because plaintiffs' claim was one of employer-wide discrimination, the segmented, isolated statistics offered were misleading and therefore meaningless.

Contrary to defendants' contention, these two cases do not stand for the proposition that plaintiffs' claim of discrimination in grain work is not cognizable. In both cases, plaintiffs charged the employer with plant-wide discrimination but offered statistical evidence which was limited to small segments of the plant. In denying plaintiffs' claims, we held that the proffered limited statistics were insufficient to prove the broad claims asserted.

Here, plaintiffs alleged discrimination in one separate job category within the industry. Naturally, then, their statistics focused on the subject area. Unlike the *Swint* and *Datapoint* plaintiffs, they did not offer a segmented statistical analysis as a means of trying to prove industry-wide discrimination. Indeed, that was not their claim. The district court, neverthe-

less, treated their offer of proof as one for industry-wide discrimination. As such, plaintiffs' statistics certainly would not prove a prima facie case, for the reasons cited in *Swint* and *Datapoint*. The court refused to consider plaintiffs' proof in the context in which it was offered, and we find this to be reversible error.

Lee v. City of Richmond, 456 F.Supp. 756 (E.D. Va.1978) and *Croker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa.1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981), also relied upon by defendants, are equally unsupportive. Both cases, as do our decisions set out above, stand only for the proposition that segmented statistical evidence of racial imbalances within a few departments cannot prove a prima facie case of employer-wide discrimination. Neither of these cases addresses the validity of a claim of segmented, departmentalized discrimination such as the one posed by plaintiffs herein. Therefore, they do not support defendants' position in this appeal.

We hold that the district court erred in refusing to recognize plaintiffs' claim and in transforming it into one of industy-wide discrimination.[9] Plaintiffs presented a cognizable claim under Title VII and § 1981. We now turn to the merits of that claim.

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9. The district court's opinion could be interpreted as recognizing plaintiffs' depatmentalized claim but rejecting the proffered statistics as non-probative because of the statistical "population" chosen by plaintiffs. We reject such an interpretation, however. Statistical analyses are easily manipulated by choosing as a comparative population a pre-selected group which will reflect the desired outcome. Therefore, a fundamental principal in the use of statistics in Title VII cases is that the population chosen for comparison be meaningful, relevant, and probative to the claims asserted. A population appropriate in one case might be inappropriate in another. In *Teamsters, supra*, plaintiffs compared the percentage of black line drivers to the percentage of blacks in the general population of various cities. 431 U.S. at 337 n.17, 97 S.Ct. at 1855 n.17. The same population was rejected by the Court in *Hazelwood School District v. United States*, 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). There, plaintiffs alleged racial discrimination in teacher hiring in a public school district. Their statistical evidence included a comparison of the percentage of black teachers hired by the district with the percentage of blacks in the geographical area. The Court held that the proper population encompassed only those blacks qualified as teachers and that plaintiffs' suggested population had little probative value in the context of the claim asserted.

The court below did not reject plaintiffs' selection of the meaningful population; rather, it rejected the sample. Both the parties and the district court agreed that the relevant population was the registered longshore workforce in

B. The Prima Facie Case

Having found plaintiffs' claim for discrimination in the allocation of grain work to be cognizable under Title VII and § 1981, we turn now to plaintiffs' evidence to determine whether a prima facie case was made. We note at the outset that the contract clause requiring the 50-50 allocation of grain work was eliminated in 1974. Because the clause formed a significant part of plaintiffs' evidence, our discussion in this section pertains only to the time period in which the objectionable clause was in effect.

Plaintiffs' claim is one of class-wide disparate treatment. Thus, the inquiry must be whether defendant treated members of the plaintiff class differently from their white counterparts, and if so, whether that difference was the result of discriminatory intent. In some cases, proof of the latter can be inferred from strong statistical evidence of the former. *Teamsters*, 431 U.S. at 335 n.15, 97 S.Ct. at 1854 n.15; *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795 at 802 (5th Cir. 1982); *Wilkins v. University of Houston*, 654 F.2d 388, 395 (5th cir. 1981).[10] Plaintiffs introduced statistical evidence which they contend proved a significant disparity between blacks and whites in the allocation of grain work.

New Orleans. Neither the court nor the defendants were willing to accept plaintiffs' choice of black grain workers as the appropriate sample, however. Their designation of this sample as irrelevant is the equivalent of finding the claim uncognizable under Title VII. Plaintiffs did not allege industry-wide discrimination; therefore, an analysis showing their overall welfare was not probative. Nevertheless, the court insisted on using blacks in the whole industry as the sample, thereby ignoring plaintiffs' claim and creating one of its own. We believe this action constitutes a rejection of plaintiffs' claim, not their statistical analysis.

10. Such an inference differs from the proof required by the plaintiff in a case alleging individual discrimination. There, a plaintiff must prove (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that the position remained open and the employer continued to seek applicants. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Wright*, 664 F.2d at 962.

[5] Statistics have become an important and useful tool in civil rights litigation. In many cases, they are the only evidence available to plaintiffs. Pragmatically, too, statistics assist in the evaluation of employer practices because "absent explanation, it is ordinarily to be expected that nondiscriminatory . . .practices will in time result in a work force more or less representative of the racial and ethnic composition of the population . . .from which employees are hired." *Teamsters,* 431 U.S. at 339 n.20, 97 S.Ct. at 1856 n.20.[11] Thus, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof . . ." *Hazelwood,* 433 U.S. at 307-08, 97 S.Ct. at 2741. *Wilkins,* 654 F.2d at 395.

Plaintiffs introduced statistical evidence showing the allocation of grain work in ten of the NOSA companies[12] for the years 1971-73. In 1971, there were six grain gangs composed of 31 whites and 32 blacks; in 1972, there were 19 gangs composed of 72 whites and 76 blacks; and in 1973 there were 18 gangs composed of 67 whites and 71 blacks. Thus while blacks comprised 75% of the registered workforce, they held only 51.3% of the grain positions. A calculation of the binomial distribution, *see Castaneda v. Partida,* 430 U.S 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), reveals that the actual number of black grain workers deviated from

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11. In this case, all parties agree that the appropriate population is the registered workforce in the Port of New Orleans.

12. Not all of the defendant companies use grain gangs and some do so only in certain years. Thus, from 1971-73, only ten companies used grain gangs.

the expected number by 10.24 standard deviations.[13] This is well sufficient to prove a prima facie case of discrimination. *Id.* at 496 n.17, 97 S.Ct. at 1281 n.17.

In addition to this strong statistical data, plaintiffs introduced into evidence the contract between the Craft I unions and NOSA which specifically compelled the allocation of grain work according to race. It provided that "so far as is practical, work is to be divided between members of ILA Locals 1418 and 1419 in grain trimming machine gangs, and/or hand trimming gangs." *Williams v. NOSA*, 466 F.Supp. at 673. In practice, this meant that grain gangs were half black and half white. *Id.*

The contract clause and the statistics are powerful evidence of purposeful discrimination. The statistics alone show that it is quite unlikely that random, impartial hiring practices would have produced such disparities. And, in light of the contract's compelled discrimination, any doubts as to purposefulness must be resolved in plaintiffs favor. We hold that plaintiffs established a prima facie case of purposeful discrimination in the allocation of grain work.

C. Defendants' Rebuttal

Once plaintiffs have proved a prima facie case of

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13. The calculation is as follows:

$$\text{Number of S/D} = \frac{O - NP}{\sqrt{NP(1-P)}}$$

where

S/D = Standard deviations
O = Actual number of black grain workers during 1971-73
N = Total number of grain workers during 1971-73
P = Probability of black person working in grain gang

$$\text{S/D} = \frac{179 - (349 \times .75}{\sqrt{(349 \times .75 (.25)}} = 10.24$$

The standard deviation represents the variance between the number of blacks expected to be grain workers in a random selection system and the number of blacks actually receiving grain work. A deviation greater than three times the standard deviation is prima facie proof that the selection system is not random. *Castaneda*, 430 U.S. at 496 n.17, 97 S.Ct. at 1281 n.17.

purposeful discrimination, defendants must rebut plaintiffs' case by discrediting plaintiffs' evidence or providing a "nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 431 U.S. at 360 n.46, 97 S.Ct. at 1876 n.46. If the defendants fail to rebut the prima facie case, plaintiffs prevail on the issue.[14]

At no point in this eleven year proceeding have defendants disputed the validity of plaintiffs' statistics relating to the allocation of grain work. In fact, the statistical data was derived from the defendant companies' Answers to plaintiffs' Interrogatories. Defendants challenged the designation of black grain workers as the sample and argued that the analysis should have focused upon *all* black longshoremen. We responded to this contention in Part I, *supra* and need not reiterate our holding.

Instead, defendants offered explanations for the statistical disparity which they contend satisfied their rebuttal burden. First, they contend that because the offensive clause was included at the insistence of black Local 1419, in following its mandate they were only following the wishes of those who now claim to have been discriminated against. This appears to be factually correct; nevertheless, it does not excuse discrimination on the part of the union or the employer. "The rights assured by Title VII cannot be bargained away—either by a union, by an employer, or by both acting in concert." *United States v. St. louis—San Francisco Railway Co.*, 464 F.2d 301, 309 (8th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1116, 93 S.Ct. 913, 34 L.Ed.2d 700 (1973). We have held "[t]he fact that a contract required this limitation [of employment opportunities] is not a justification if it is discriminating." *United States v. Hayes International Corp.*, 456 F.2d 112, 117 (5th Cir. 1972). Clearly, then, neither the existence of the contract nor its origin can

14. This is more onerous than the rebuttal burden required of defendants in individual Title VII claims under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254—256, 101 S.Ct. 1089, 1094—95, 67 L.Ed.2d 207 (1981). *Cf. Castaneda v. Pickard*, 648 F.2d 989, 994 (5th Cir. 1981).

exonerate defendants' discriminatory practices.

[8] Second, defendants claimed that because blacks in the longshore industry fared overall as well as or better than whites, any misallocation of grain work is irrelevant. As we stated above, this type of analysis transforms plaintiffs' claim into one of industry-wide discrimination. Whether blacks as a whole suffered economically has no bearing on the issue of discrimination in the allocation of grain work. *Swint*, 539 F.2d at 92. Plaintiffs readily admit that industry-wide earnings of blacks may be relevant on the issue of backpay. This evidence has no place in the liability phase, however. *Id.* Defendants also argue that grain work was no more desirable than any other type of work. Although it paid a 20¢ per hour premium, it was unpleasant. The desirability of grain work is irrelevant as well. Title VII provides for equal opportunities in *all* jobs whether better or worse than others. *Teamsters*, 431 U.S. at 338 n.18, 97 S.Ct. at 1855 n.18; *Hayes International Corp.*, 456 F.2d at 118.

Finally, defendants argued that the casual nature of the longshore industry precludes a finding of discrimination. We have already described the shape-up process and the many variables that determine a longshoreman's position and earnings. The unpredictability of available work coupled with the personal choices inherent in the system normally would complicate our inquiry. Because so many of the factors determining work patterns are not within the employer's control, and in fact are determined by the employees, it is more difficult to attribute statistical imbalances to a discriminatory motive on the part of the employers. Here, however, we need not speculate as to the reasons for the imbalance because the contract shows that such an allocation was required. Whether the casual nature of the industry could or would have produced similar disparities is irrelevant in the face of the explicit language of the Deep Sea Agreement.

We hold that defendants failed to rebut plaintiffs' prima facie case of purposeful discrimination in the

allocation of grain work during the existence and application of the 50-50 clause. The statistical data introduced by plaintiffs pertains only to the period during which the discriminatory contract was in force. Because our conclusions are based upon evidence relative to this period only, our finding of discrimination is limited accordingly. Plaintiffs contend that even after the deletion of the 50-50 clause, the practice of discriminatory allocation continued. We turn now to that claim.

D. Discrimination in the Allocation of Grain Work After the Deletion of the 50/50 Clause

Thus far we have held that there was purposeful discrimination in the allocation of grain work during the pendency of the grain clause. Plaintiffs contend that the discriminatory practice continued after the deletion of the clause and that the court below erred in refusing to consider the issue. Defendants argue that plaintiffs waived the issue of post-clause discrimination because they failed to request its consideration by the court.

It is plaintiffs' assertion that the clause was eliminated after the close of the record; defendants contend the opposite. We find plaintiffs' assertion ironic. If the clause were eliminated after trial, the record would have closed, and thus the only evidence plaintiffs could have produced would have concerned the practices existing during the application of the clause. Because a court's consideration need not extend to claims for which plaintiffs produce no evidence, *Rivera v. City of Wichita Falls*, 665 F.2d 531, 536 n.6 (5th Cir. 1982), the district court would have been justified in refusing to consider the claim of post-clause discrimination. Thus, if plaintiffs are correct in their assertion as to when the clause was eliminated, the only way they could be entitled to a finding on post-clause discrimination would be by petitioning the court to reopen the case, which they have not done.

On the other hand, if the clause were eliminated during the trial, plaintiffs' failure to request a ruling

would not constitute a waiver of the claim. Plaintiffs claimed that defendants were guilty of allocating grain work in a descriminatory manner. The contract clause was offered as evidence of that practice. While plaintiffs certainly objected to the clause, the subject of their claim was the *practice* of discriminatory allocation, whatever its source, and the court's inquiry should have focused on the practice. By bringing such a claim, plaintiffs requested consideration of the issue of post-clause discrimination. An additional request would not have been necessary.

We believe both parties are partially correct in their statements as to when the clause was deleted. The trial took place from July 22 to September 20, 1974, during the time that the Deep Sea Agreement was being renegotiated. The Agreement was to expire on September 30, 1974. By mid-September, it must have become painfully apparent that the grain clause was doomed, and as "a tactic of this litigation," *Williams v. NOSA*, 466 F.Supp. at 673, NOSA and Locals 1418 and 1419 decided to eliminate the clause from the new contract. But the new contract was not actually effective until October 1, 1974. So although it was agreed during the trial that the clause would be deleted, the action was not officially taken until after the trial ended.

Because the trial court was aware of the imminent elimination of the clause, we find that the issue was before it and should have been considered. At the close of the trial, however, plaintiffs had produced no evidence on the issue. In subsequent affidavits submitted on a summary judgment motion, plaintiffs offered evidence showing that the discriminatory practice continued notwithstanding the elimination of the clause. Defendants responded with counter-affidavits. When plaintiffs moved for reconsideration of the grain issue in 1979, their supporting memorandum noted the conflicting affidavits and insisted that the issue could not be resolved without an evidentiary hearing.

The trial court granted plaintiffs' motion for re-

consideration of the grain issue. But, without another hearing and relying only upon the evidence adduced at trial five years earlier, the court reiterated its former holding that the proper comparison was between blacks and whites in the entire industry. This conclusion foreclosed a decision on post-clause discrimination in grain work. The grain work issue was not mentioned despite the fact that plaintiffs brought to the court's attention the conflicting affidavits. The court, however, would consider only the industry-wide claim.

Plaintiffs are entitled to a hearing on the issue of post-clause discrimination. We remand this issue to the district court so that all parties may present evidence as to whether or not discrimination continued after the 50-50 clause was deleted.

III. DECK AND WHARF JOBS

A. The Prima Facie Case

Next, plaintiffs claim that the court below erred in refusing to find discrimination in the assignment to deck and wharf positions in integrated general cargo gangs. General cargo gangs are comprised of sixteen members, eight of whom work in the hold of the ship while the other eight work on the deck or wharf. Deck and wharf jobs are regarded by all as more desirable than hold positions because the work is less physically demanding and permits the longshoreman to be out in the fresh air rather than confined to the bowels of the ship.

Job assignments are made by gang foremen. During the relevant time period, gangs were either all black or integrated. Black gangs had either black or white foremen, while integrated gangs always had white foremen. Plaintiffs alleged discrimination by white foremen in the assignment of the preferred positions in integrated gangs. They offered statistical proof of this and argue that they met their prima facie burden of proof and that defendants' rebuttal evidence was insufficient.

Again, we are faced with a dispute over the proper statistical analysis. Plaintiffs contend that the only

relevant statistics are those reflecting assignments within integrated gangs, all of which were overseen by white foremen. Defendants argue that such an analysis ignores 40-45% of all general cargo workers and in doing so penalizes those companies which have promoted blacks to foreman positions or have given all their general cargo work to black longshoremen. The district court agreed with defendants and examined the situation of all genral cargo workers in making its findings.

We find plaintiffs' focus to be the proper one. Although it excluded over 40% of the general cargo workers, many of whom were black, it did so because those statistics were irrelevant to the issue. Plaintiffs alleged racially discriminatory assignments. Unless a gang was integrated, racial discrimination within the gang was impossible. Therefore, the proper analysis includes only integrated gangs. And, because integrated gangs always had white foremen, the analysis must exclude gangs with black foremen.

Plaintiffs produced statistics showing that in 1972 and 1973, whites in integrated gangs were twice as likely as blacks to be assigned to deck and wharf jobs.[15] In 1972, blacks made up 82% of the integrated

15. Statistics for 12 NOSA Companies, 1972-73

1972:	WHITE	BLACK	TOTAL
Number in integrated general cargo gangs	194	884	1078
% in integrated general cargo gangs	18%	82%	100%
Number in deck and wharf jobs	162	340	502
% in deck and wharf jobs	32%	68%	100%

$$\text{Number of S/D} = \frac{340 - (502)(.82)}{\sqrt{(502)(.82)(.18)}} = 8.33$$

1973:	WHITE	BLACK	TOTAL
Number in integrated general cargo gangs	220	885	1105

1973:	WHITE	BLACK	TOTAL
% in integrated general cargo gangs	20%	80%	100%
Number in deck and wharf jobs	196	341	537
% in deck and wharf jobs	36%	64%	100%

$$\text{Number of S/D} = \frac{347 - (537)(.80)}{\sqrt{(537)(.80)(.20)}} = -8.9$$

general cargo gang population but held only 68% of the deck and wharf jobs producing a variance of 8.3 standard deviations. In 1973, blacks comprised 80% of the population but held only 63% of the preferred jobs, producing a variance of 8.9 standard deviations.[16]

Plaintiffs' statistics revealed gross disparities giving rise to an inference of purposeful discrimination. *Hazelwood*, 433 U.S. at 307—08, 97 S.Ct. at 2741. The burden then fell to defendants to rebut this evidence.

B. The Defendants' Rebuttal

Defendants contend that assignments to deck and wharf jobs were made on the basis of gang longevity and individual skill without regard to race. The district court accepted this contention and based its finding of nondiscrimination on those factors. Plaintiffs argue that the court erred in making this finding and that its conclusion was actually based upon its belief that there was a "trend of a steady movement of black longshoremen into 'preferred' work . . ." *Williams v. NOSA*, 466 F.Supp. at 675—76.

We must disagree with plaintiffs on both assertions. First, we interpret the courts' language concerning the "trend" to mean that despite pre-Title VII discrimination,[17] defendants' assignment system permitted blacks to make great strides in general cargo gangs. The court ruled against plaintiffs because defendants' assignment system was legitimate and reasonable explanation for the disparities as well as the catalyst for the upward movement apparent in the statistics, and not because the strides negated any ex-

16. Even if we accept defendants' contention that *all* general cargo gangs must be included in the analysis, the figures still favor plaintiffs. For example, in 1973, blacks comprised 87.6% of the general cargo gang population but held only 673 of the 869 deck and wharf jobs, producing a variance of 8.3 standard deviations.

17. At trial, it was established that prior to the enactment of Title VII, blacks automatically were relegated to hold positions and whites to the deck and wharf.

isting discrimination.

Plaintiffs contest the district court's reliance on the seniority-based assignment system not because such a system violates Title VII or § 1981,[18] but because defendants allegedly failed to prove its existence. Again, we disagree.

At trial, both sides presented evidence concerning the assignment system. Several witnesses, including class representative Richard, testified that there was a custom or practice[19] of filling openings in the preferred deck and wharf jobs with the most senior member in the hold, provided he had the requisite skills. There was testimony by defense witnesses recounting various incidents where this custom was enforced, and contradictory testimony by some plaintiffs' witnesses concerning promotions without regard to gang tenure.

The district court was justified in concluding that there was a custom or practice of making assignments on the basis of seniority. In fact, plaintiffs' witness so

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18. 42 U.S.C. § 2000e—2(h) provides as follows:

> Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . .system, . . .provided that such differences are not the result of an intention to discriminate because of race . . .

Prior to the enactment of Title VII, there was discrimination in work assignments. Although Title VII prohibits the continuation of such a practice, this provision has been interpreted to permit assignments based upon an otherwise fair seniority system even if that system perpetuates the effects of pre-Title VII discrimination. *Teamsters*, 431 U.S. at 345-356, 97 S.Ct. at 1859-1865. A bona fide seniority system is also a defense to § 1981 claim. *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1118 (5th Cir. 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 l.Ed.2d 74 (1979).

19. In most cases, the terms of a seniority system are contained in the contract negotiated between the employer and the union, *e.g., Teamsters, supra;* however, there is nothing in Title VII, its legislative history, nor the *Teamsters* case to indicate that a system unilaterally adopted by the employer can not be bona fide. *E.E.O.C. v. E.I. du Pont de Nemours & Co.*, 445 F.Supp. 223, 248 (D.Del. 1978). The same is true of a system which is not embodied in a written document. That the terms of the system are not in writing may go to the force of the proof necessary to establish its existence, but that fact does not render the system automatically invalid. In the instant case, defendants succeeded in proving the existence and bona fides of the system through the testimony of witnesses, including one of the plaintiffs, despite the fact that there was no written evidence of the system.

testified. The fact that the system occasionally was disregarded does not render it invalid. Because plaintiffs alleged a pattern or practice of discriminatory assignments, they had to "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855.

Defendants rebutted plaintiffs' prima facie case with more than mere "affirmations of good faith," *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). They produced evidence, including evidence from one of plaintiffs' own witnesses, proving that assignments were made according to gang longevity and individual skill.

The record amply supports the district court's conclusion that job assignments within general cargo gangs were made on the basis of seniority and skill. Prior to Title VII's enactment, virtually no blacks were in the preferred positions. Since then, however, the figures indicate that blacks have been moving rapidly into deck and wharf jobs. Plaintiffs' exhibits showing that as of 1973, 63% of all deck and wharf jobs were performed by blacks illustrate the effectiveness of the system. If this trend continues, by the time this appeal is resolved, blacks may have overcome completely the final vestiges of pre-Title VII discrimination even though seniority is applicable.

Although we disagree with some of the court's statistical analysis, we affirm its finding on the ultimate issue of discriminatory assignments.

IV. CLASS CERTIFICATION

Plaintiffs brought this suit as a class action pursuant to Fed.R.Civ.P. 23. The district court denied a pre-trial motion by defendants to dismiss the class claims and allowed the case to proceed as a class action. Ultimately, class certification was denied on the ground that the proposed class lacked the requisite numerosity, and in the alternative, that plaintiffs fail-

ed to prove discrimination against any group of employees similarly situated.[20]

We find that the court erred in refusing to certify a class with respect to the grain claim but properly refused certification for the deck and wharf claim.

A. The Grain Claim

In pressing this claim, plaintiffs sought to represent all blacks who were denied opportunities to work in grain gangs because of defendants' discriminatory practices. This would include all those who actually sought grain work but were refused the opportunity, those who had been deterred from trying to get grain work because of knowledge of the discriminatory policy, and those who would become subject to this practice in the future. *Phillips v. Joint Legislative Committee on Performance & Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir. 1981). During the relevant time period, there were hundreds of blacks working in the Port of New Orleans any or all of whom might have been affected by the discrimination.

In determining whether a proposed class is sufficienctly numerous, the court's inquiry must focus upon the practicability of joining all aggrieved parties. Here, an accurate count of all those aggrieved is virtually impossible, much less an identification of the actual persons. In these circumstances, joinder is certainly impossible, *id.* at 1022; *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974), and because of this impossibility, the numerosity requirement is met.

The court relied upon *Bailey v. Ryan Stevedoring Co.*, 528 F.2d 551 (5th Cir. 1976), *cert. denied*, 429 U.S.

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20. Defendants also argue that the named plaintiffs may not represent the class because none testified that he sought work in a grain gang or was denied a deck or wharf position. The Pre-Trial Order, however, refutes this contention. At least one of the named plaintiffs claimed to be a victim of each type of discrimination alleged in this appeal. That they did not prevail on their individual claims does not render them inappropriate representatives. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

1052, 97 S.Ct. 767, 50 L.Ed.2d 769 (1977), in concluding that most of the black longshoremen plaintiffs sought to represent did not want to be included in the class. This case is distinguishable from *Bailey*, however. There we denied certification because a majority of the members of the proposed class petitioned the court to be excluded from the class. In this case, there was no such action by black longshoremen. The court referred to its awareness of the black Local's resistence to and resentment of the merger of the segregated locals. Whether members of the black Local were in favor of or opposed to union merger is irrelevant because our concern in this appeal is with the issues of discrimination in grain work allocation. Furthermore, the resistence relied upon by the court is a far cry from the unequivocal message contained in the *Bailey* class members' petition.

The court held, in the alternative, that certification was inappropriate because discrimination had not been proved. Because we have found discrimination in the allocation of grain work, this basis for the court's denial of certification is no longer valid.[21]

B. Deck and Wharf Claims

For the reasons just stated, we find that plaintiffs met the numerosity requirement. We affirm the court's denial of certification, however, on the alternative ground that no discrimination was proved, as set out above.

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21. Defendants interpret the court's alternative ground as meaning that certification was denied because there was no similarly situated group of employees who could have been discriminated against. They argue that the casual employment relationship between the stevedores and their employees coupled with the manifold personal factors involved in the determination of positions renders the proposed class too differentiated. We disagree with this interpretation. Our understanding of the court's opinion is that certification was denied because plaintiffs lost on the merits, not because a finding of discrimination was impossible by virtue of the nature of the industry. Furthermore, even if we accepted defendants' interpretation, we would reject its rationale. As we have already held, the nature of the industry does not shield it from charges of discrimination.

V. CONCLUSION

Plaintiffs proved that defendants engaged in purposeful discrimination against black longshoremen in the allocation of grain work through July of 1974. We certify the plaintiff class to consist of all registered black longshoremen who were eligible for grain work during the relevant time period. This includes all those who sought grain work but were refused as well as those who were deterred from seeking grain work because of the discriminatory allocation. This class is certified for purposes of this claim, and we remand the cause to the district court to determine the appropriate relief for discrimination through July of 1974 as well as the defendants' liability, if any, for post-July, 1974 discrimination. We affirm the district court's finding that there was no racial discrimination in assignments within general cargo gangs, and its denial of class certification with respect to this class.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX F

George James WILLIAMS, et al
Plaintiffs-Appellants

v.

NEW ORLEANS STEAMSHIP ASSOCIATION, et al., Defendants-Appellees

No. 80-3886

United States Court of Appeals
Fifth Circuit

October 8, 1982

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion April 9, 5th Cir., 1982, 673 F.2d 742)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

The petitions for rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Fed. R. App.; Local Fifth Circuit Rule 16) the suggestions for rehearing en banc are DENIED.

I.Segmented Claim a Question of Law

In denying the motions for rehearing and the suggestions for rehearing en banc, the Court believes that there is value in commenting upon the issues urged upon the Court by the parties filing the petitions and the suggestions. This is particularly so with respect to the matter constituting the major emphasis of the assertions made. After the decision of the Court in this case, 673 F.2d 742 (5th Cir. 1982), the Supreme Court decided the case of *Pullman-Standard v. Swint*, — U.S. —, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). *Swint* was an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Supreme Court reversed our decision, *Swint v. Pullman-Standard*, 539 F.2d 77 (5th cir. 1976), holding that a Court of Appeals is bound by the "clearly erroneous" rule of Fed. R. Civ. Proc. 52(a) in reviewing a district court's finding of fact whether or not the finding of fact is classified as an "ultimate

fact." The Court made it clear, however, that in applying the clearly erroneous standard to the review of all findings of fact, it was not changing the standard with respect to the review of conclusions of law. The opinion of the Court said "The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." This is precisely the situation involved in the case sub judice.

We held that our review of the district court's finding that there had not been racial discrimination was not bound by the clearly erroneous standard because it was based upon an erroneous view of the law concerning the legal validity of segmented claims. When the plaintiffs presented their grain work claim to the court, they argued that there was discrimination with respect to grain work which was distinct from other discrimination allegedly existing in the industry. The court refused to accept the claim, however, and instead converted the claim into one of industry-wide discrimination. The district court never addressed the issue of whether grain work was factually a distinct and separate category. The only statement made by the court in which its reason for rejecting the segmented claim is shown was in the minute entry of June 30, 1980, which stated, "Since he (the longshoreman) may work various types of cargo at different hours in any given week, the important thing is how he fares overall." This statement was unequivocally a statement of the law of the case and not of particular facts found.

The manner in which the district court handled plaintiffs' segmented claim was the equivalent of a dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Rather than dismiss the claim altogether, however, the court allowed the plaintiffs to try the broader claim that black longshoremen in the entire industry suffered economically as a result of alleged discrimination in this one job category. This change in the nature of the plaintiffs' claim was based entirely on the decision of the district judge that the law required that the issue of

discrimination in grain work not be separately cognizable. We found this to be an error in law which is not limited to the clearly erroneous standard of review.

The *Swint* case is not implicated by this Court's opinion. We did not distinguish between ultimate and subsidiary facts, we did not even make mention of such a distinction; we did not review mixed questions of law and fact; and we did not suggest that ultimate findings might be synonymous with legal conclusions and therefore reviewable free of the clearly erroneous standard.

Our holding that the court operated under an erroneous view of the law raises the question of whether our conclusion that the question is one of law is correct. Petitioners contend that the inquiry into whether a job category constitutes an entity with distinct and separate characteristics is a question of fact. We are in full agreement with this assertion. Had the district court found that grain work was factually indistinguishable from other jobs we would be bound by that conclusion unless clearly erroneous. The district court did not make this finding, however. It presumed that *even if* grain work was distinct and different from other work, a claim alleging discrimination in that area only would not be cognizable. This was clearly a legal conclusion. Thus, *Swint* does not in any way trench upon our holdings in this case.

II. Grain Work as a Separate Job Category

Petitioners also again challenge our conclusion that the grain work is a separate job category. As to the unique aspects of grain work, little can be added to our opinion. The petitioners obviously focus upon the fact that most longshoremen perform a variety of longshoring jobs and that grain work is simply one of those jobs. If the problem, however, is approached from the standpoint of the job rather than those who fill it, the distinctive nature of grain work is readily apparent. The parties recognized this themselves when they made a

separate contract overtly setting a racial quota for grain work. Grain work is recognized as different in other ways. For example, the contract provided for an independently negotiated rate for grain work which was 20¢ per hour higher than the general hourly rate.

If we were not to view grain work as separable, we would be allowing a union and employer association openly to discriminate by contract on the basis of race so long as the industry-wide effects from other jobs tended to equalize or cancel out the discrimination. There is no authority whatsoever in the law to justify such open and blatant racial discrimination in a job which the parties themselves treat as separate from others.

The cases which the parties urge do not alter this conclusion. The leading case of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), involved two separate classifications of drivers, line drivers and city drivers. Each employee was either a line driver or a city driver, but not both. We stress that we did not rely upon *Teamsters* on the issue of separability. In fact the Supreme Court itself in that case did not even mention the problem of separability. It just assumed that the employer work force was separable. We cited the case only as proof of the fact that separability is valid within an employer's cadre of employees or an industry, and also as an example of a successful segmented suit. It is obvious that the operation of the trucking industry renders it more susceptible to segmented claims than does the operation of the longshoring industry. It does not undermine the basic principle, however, that an employer is forbidden to discriminate in one or more jobs in the company regardless of the overall facade of non-discrimination.

Both *Swint v. Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976), and *EEOC v. Datapoint Corp.,* 570 F.2d 1264 (5th Cir. 1978), are cases in which the plaintiffs complained of discrimination throughout a particular plant or a particular workforce. In both of the cases the

plaintiffs offered statistical evidence showing racial imbalances in small segments of the employers' workforce. We only concluded that the segmented evidence was meaningless and inadequate because the plaintiffs had lodged employer-wide claims. Those two cases are close to being the opposites of this case.

We must, therefore, reaffirm our conclusion that a separate claim of racial discrimination with respect to the grain work was legally authorized under Title VII and 42 U.S.C. § 1981 and that the district court in not allowing the separate claim made an error in law.

III. Class Representation

Petitioners also challenge the adequacy of class representation. As stated in footnote 20 of our opinion, there was at least the allegation that one of the named individuals had been a grain worker or had sought grain work. The district court's opinion, 466 F.Supp. 662, 671 (E.D. La. 1979), refers to John Aaron's position as a grain worker. The district court refused to certify a plaintiff class because of lack of numerosity and failure to prove discrimination overall. The court did not find that named plaintiffs were in any way inadequate to represent a class of grain workers.

The petitioners complaint is that none of the individuals actually testified at trial that they had personally suffered from discrimination in the allocation of grain work. This, it is argued, leads to the conclusion that they were inadequate representatives. In the first place it must be remembered that the case was tried on the basis of proving overall discrimination, not discrimination in grain work. Second, plaintiffs introduced statistical evidence showing the effects of grain work discrimination on themselves and the class.

It must be concluded that, in a major sense, the district court by its rulings cut off the development of specific testimony to isolate particular people as having engaged in grain work. The record is quite clear, by implication however, and indeed by the very argument

which the plaintiffs make in trying to say that grain work is not separable, that many of the longshoremen at the New Orleans port have worked in grain gangs, and can serve as adequate class representatives of a class limited to challenging discrimination in grain work.

IV. Finding of Racial Discrimination in Grain Work

Petitioners also challenge the propriety of deciding the merits of the grain work claim rather than remanding it once we found the separate claim valid. *Swint* holds that "where findings are infirm because of an erroneous view of law, a remand is the proper course unless the record permits only one resolution of the factual issue." 102 S.Ct. at 1792 (emphasis added). This is simply a reaffirmation of a long standing rule of which we were well aware in reaching our decision. A review of the record, particularly the statistics and the overtly discriminatory contract provision, convinced us that there was only one possible resolution of the issue. The evidence shows unmistakably that defendants discriminated purposefully and with a precise quota system on the basis of race in the allocation of grain work. A remand on that issue would be a waste of time.

The conclusion does not mean that there are automatically high awards of back pay available. Proof of discrimination in a class action establishes a presumption that each class member has experienced discrimination, but it does not mean that each member is entitled to back pay. To obtain a back pay award, each claimant must show (I) he or she is a member of the class; (II) that he or she was a "potential" victim of the discrimination (that he or she sought and was refused grain work or would have sought grain work but for the discriminatory practice); and (III) the factual basis for computing the back pay award. *See* C. Sullivan, M. Zimmer, & R. Richards, Federal Statutory Law of Employment Discrimination Section 9.1, pp. 516-519

(1980). The burden will be on each longshoreman to prove the particular economic loss. The record contains employment records from most of the stevedores, but the longshoremen will have to prove that he or she lost wages because of being kept out of grain work, and prove the amount of wages lost. A district court has broad discretion in conducting the so-called "Stage II" proceeding, and it is the province of the district court to formulate the remedies.

V. Continuing Discrimination in Grain Work

Finally, petitioners question the propriety of our reaching the issue of discrimination in grain work after the clause was deleted from the contract. The deletion in the contract took place about two months after the trial was concluded on September 20, 1974. It is not argued that the alleged post-clause discrimination was as matter of time beyond the scope of the claim, only that it was substantively different. However, plaintiffs original complaint was directed at the *practice* of discriminatory allocation of grain work whatever its source. The fact that the clause compelling discrimination had been deleted, standing alone, did not automatically dissolve the claim. The date that the trial was concluded is not the significant date with respect to these claims. It was nearly five years after the trial before the court issued its first opinion in the case. During those five years, motions, briefs, and evidence were submitted to the court. After the court rendered its initial opinion in 1979, it reopened the grain issue and accepted more evidence and memoranda. Plaintiffs continued to submit evidence showing that discrimination still existed in spite of the deletion of the clause, and they asked for a hearing on the issue.

Until the trial court issued its final order in 1979, it retained jurisdiction over the case and obviously was entitled to order a remedy which would solve the problem once and for all. The court could have ordered post-clause relief in its original order in 1979. But in

any event it was entitled to do so in 1980 when it reopened the grain issue. At that time, the plaintiffs submitted evidence showing that the elimination of the clause had not cured the discrimination. The issue was squarely before the court. The court refused the make post-clause findings, however, because it still was in error in finding that a segmented claim was not authorized by law.

Petitioners' further assertion that the post-clause discrimination was not properly before the court because it was not subject to an EEOC charge cannot be accepted. Plaintiffs' original EEOC charge concerned the *practice* of racial discrimination in grain work, not just the existence of the grain clause. The EEOC charge, therefore, covered any racial discrimination in grain work, regardless of its source, occurring from 180 days before the charge was filed until the discrimination ended. Petitioners' reliance on *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), is not persuasive. In that case the EEOC complaint involved charged only sex discrimination. We held that such a charge could not serve as the basis of a Title VII claim charging racial and national origin discrimination.

Finally, on this point, we remind petitioners that plaintiffs also alleged violation of 42 U.S.C. § 1981. Even if the lack of an EEOC charge were relevant, and we find it is not, the plaintiffs still would be entitled to relief under § 1981 if they can establish individual claims.

Petitions for rehearing DENIED and suggestions for rehearing en banc DENIED.

42 § 2000e-2. Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviliges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color,

religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational insti-

tution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this subchapter, shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privi-

leges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to

membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 § 1981. Equal Rights Under The Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).